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No. 11307 *N. 2444*

United States
Circuit Court of Appeals
For the Ninth Circuit.

TONY LEGATOS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED

JUN 22 1946

PAUL P. O'BRIEN,
CLERK

No. 11307

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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U. S. Attorney.

EMMET J. SEAWELL, ESQ.,

Assistant U. S. Attorney,

Sacramento, California.

In the Northern Division of the United States
District Court for the Northern District of
California

No. 9522

UNITED STATES OF AMERICA

vs.

CHRIS ANDREW MARITSAS and TONY
LEGATOS,

Defendants.

FIRST COUNT: (T. 26 U.S.C., Section 2871)

In the October, 1945, term of said Division of said District Court, the Grand Jurors thereof, upon their oaths present: That

Chris Andrew Maritsas and Tony Legatos (hereinafter called "said defendants") on the 18th day of July, 1945, at a place known as "Golden Tavern," located at 621 K Street, in the City of Sacramento, County of Sacramento, State of California, within said Division and District, did wilfully, knowingly and unlawfully re-use liquor bottles, to-wit a total of 31 bottles, as follows:

12 bottles of 4/5 quart capacity of whiskey, bearing the label of Schenley Reserve Blended Whiskey;

2 bottles of 4/5 quart capacity of whiskey, bearing the label of Schenley Reserve Blended Whiskey;

- 3 bottles of 4/5 quart capacity of whiskey, bearing the label of Four Roses, a Blend of Straight Whiskies;
- 2 bottles of 4/5 quart capacity of whiskey, bearing the label of Seagram's Seven Crown Blended Whiskey;
- 2 bottles of 4/5 quart capacity of whiskey, bearing the label of Lord Calvert Blended Whiskey;
- 2 bottles of 4/5 quart capacity of whiskey, bearing the label of Old Charter Straight Whiskey;
- 2 bottles of 4/5 quart capacity of whiskey, bearing the label of Old Forester Straight Whiskey;
- 2 bottles of 4/5 quart capacity of whiskey, bearing the label of Old Hermitage Straight Whiskey;
- 2 bottles of 4/5 quart capacity of whiskey, bearing the label of Seagram's V.O. Blended Whiskey;
- 2 bottles of 4/5 quart capacity of whiskey, bearing the label of Johnnie Walker Black Label Blended Whiskey

in violation of the provisions of Section 175.41 of Regulations 13 prescribed by the Secretary of the Treasury in pursuance of the provisions of Title 26 U.S.C. Section 2871.

SECOND COUNT: (Title 26 U.S.C., Section 2802)

And the said Grand Jurors, upon their oaths, do further present: That at the time and place described in the first count of this indictment said defendants did wilfully, knowingly and unlawfully place distilled spirits in 31 bottles which had been

stamped and filled without destroying the stamp previously affixed to such bottles, said bottles being listed and described in the foregoing first count of this indictment.

FRANK J. HENNESSY,
United States Attorney.

By: /s/ EMMET J. SEAWELL,
Assistant U. S. Attorney.

(Endorsed): A True Bill.
GEO. G. RADCLIFF,
Foreman.

[Filed]: Nov. 29, 1945. [2*]

[Title of Court and Cause.]

MOTION TO DISMISS AND MOTION TO
MAKE MORE CERTAIN

Now comes Chris Andrew Maritsas and Tony Legatos, designated in the indictment as defendants, and move to dismiss the first count of said indictment and quash the same on the grounds that the allegations contained in said first count do not state facts sufficient to constitute a crime against the United States.

2. Said defendants hereby move the court for an order directing the first count of said indictment to be made more certain in the following respects and particulars:

* Page numbering appearing at foot of page of original certified Transcript of Record.

(a) To designate and indicate for what purpose if at all said liquor bottles were unlawfully re-used;

(b) How or in what manner defendant violated, if at all, the provisions of Section 175-41 of Regulations 13 prescribed by the Secretary of the Treasury in pursuance of provisions of Title 26 U.S.C. Sec. 2871.

/s/ JOHN L. BRANNELLY,

/s/ ANTHONY J. KENNEDY,

Attorneys for Defendants.

Points and Authorities: U. S. v. Keitel, 157 Fed. 396.

[Endorsed]: Filed Dec. 14, 1945. [3]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Friday, the 14th day of December, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Martin I. Welsh, District Judge.

[Title of Cause.]

This case came on regularly this day for the entry of the plea of the defendants. The defendants Tony Legatos and Chris Andrew Maritsas were present in Court with Anthony J. Kennedy, Esq., and John L. Brannely, Esq., their attorneys. Emmet J. Seawell, Esq., Assistant U. S. Attorney, was

present for and on behalf of the United States. Mr. Kennedy presented and filed a motion to dismiss and motion to make more definite and certain. After hearing Mr. Kennedy and Mr. Seawell, it is Ordered that the motions be and the same are hereby denied. The defendants were called upon to plead and each defendant thereupon plead Not Guilty of the offenses charged in the Indictment, which said pleas were Ordered entered. The defendants and the attorneys thereupon in open Court demanded a trial by jury. After hearing Mr. Seawell and Mr. Brannely, it is Ordered that this case be and the same is hereby set for January 17, 1946, for trial before a jury. [4]

[Title of District Court and Cause.]

PETITION ON MOTION TO SUPPRESS
EVIDENCE

Comes now Tony Legatos, one of the defendants in the above entitled cause, and shows as follows:

1. In October, 1945, term of this Court, an indictment was returned against defendant and a certain other person named therein, for violating Section 2803 of Title 26 of the United States Code and Regulation 175.41 promulgated under Section 2871 of Title 28 of the United States Code.

2. A plea of Not Guilty was interposed to these charges.

3. Prior to the day this indictment was returned,

and on or about July 18, 1945, there was seized at premises located at 621 K Street, city of Sacramento, County of Sacramento, State of California, within said Division and District, which said premises belonged to and were under the possession and control of this defendant, 31 bottles of liquor then and there the property and possessions of this defendant, which said bottles are more particularly described in the first count of said indictment.

4. This seizure was done by officers of the United States acting without any warrants of arrest or search, who entered into said premises without any authority from this defendant and then conducted a search of the premises and of defendant's property there without any right to do so [5] whatever, following which the officers made the seizures described above.

5. These officers are now withholding this property from defendant and intend to use it as evidence against defendant upon the trial of the matters charged in said indictment.

Therefore, defendant claims that his rights were invaded in the seizure of said 31 bottles of liquor, and defendant prays for the return of said bottles and contents and that said bottles and their contents be suppressed as evidence because of the afore-said violation of defendant's rights under the provisions of the 4th and 5th Amendments to the Constitution, and defendant particularly prays as follows:

(a) That all said 31 bottles of liquor and their

contents be excluded from the trial upon said indictment and that this Honorable Court now make its order of suppression;

(b) That all said property so seized by trespass be returned to defendant.

Dated at Sacramento, California, January 12, 1946.

/s/ TONY LAGOTOS,
Petitioner. [6]

State of California,
County of Sacramento—ss.

Tony Legatos, being first duly sworn, deposed and says:

That he is one of the defendants in the above entitled action; that he has read the foregoing Petition on Motion to Suppress Evidence and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ TONY LEGATOS

Subscribed and sworn to before me this 12th day of January, 1946.

[Seal]

S. RYPZYNSKI,

Notary Public, Sacramento
County, California

Copy received 1/15/46.

/s/ EMMET J. SEAWELL,
Asst. U. S. Attorney.

[Endorsed]: Filed Jan. 15, 1946. [7]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 21st day of January, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Martin I. Welsh, District Judge.

[Title of District Court and Cause.]

This case came on regularly this day for a hearing on the motion to suppress. The defendants Tony Legatos and Chris Maritsas were present in Court with Anthony J. Kennedy, Esq., and John L. Brannely, Esq., their attorneys. Emmet J. Seawell, Esq., Assistant U. S. Attorney, was present for and on behalf of the United States. Mr. Kennedy made a statement to the Court for and on behalf of the defendant. Tommy O'Leary, Tony Legatos, Chris Maritsas and Leonard D. Standerson were sworn and testified for and on behalf of the defendants. After hearing Mr. Kennedy and Mr. Seawell, it is Ordered that the motion to suppress be and the same is hereby Denied, and an exception noted. On motion of Mr. Kennedy and with the consent of Mr. Seawell, it is Ordered that the Secretary of the Treasury or his authorized representative J. H. Maloney, District Supervisor, Alcohol Tax Unit, are hereby directed to give samples of liquor in question to the representatives of the defendants or their attorneys. [8]

[Title of District Court and Cause.]

MOTION TO DISMISS FIRST COUNT OF IN-
DICTMENT UNDER RULE 12, FEDERAL
RULES OF CRIMINAL PROCEDURE FOR
THE DISTRICT COURTS OF THE
UNITED STATES

Now come Chris Andrew Maritsas and Tony Legatos, designated in the indictment as defendants, and move to dismiss the first count of said indictment and quash the same on the ground that said first count does not state a crime or an offense against the United States, for the following reasons:

1. That said count does not designate or indicate for what purpose if at all said liquor bottles were unlawfully used;

2. How or in what manner defendants violated, if at all the provisions of Section 175.41 prescribed by the Secretary of the Treasury in pursuant of the provisions of Title 26, United States Code, Sec. 2871;

3. It is not alleged in said first count of said indictment that the defendants or either of them had actual knowledge of Sec. 175.41 of the regulations of Secretary of the Treasury under the provisions of Title 26 United States Code Sec. 2871 or that said rules and regulations were published in the Federal Register as required by the Federal Register Act 49 Stats. 501, 44 U.S.C. Sections 303-311.

JOHN J. BRANNELLY,
ANTHONY J. KENNEDY,
Attorneys for Defendants.

[Endorsed]: Filed April 4, 1946. [9]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Friday, the 5th day of April, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Martin I. Welsh, District Judge.

[Title of Cause.]

This case came on regularly this day for a hearing on the motion to dismiss the first count of the Indictment. Anthony J. Kennedy, Esq., was present for and on behalf of the defendants. Emmet J. Seawell, Assistant U. S. Attorney, was present for and on behalf of the United States. After hearing Mr. Kennedy and Mr. Seawell, it is Ordered that the motion to dismiss the first count of the Indictment, be and the same is hereby denied. [10]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room, thereof, in the City of Sacramento, on Tuesday, the 9th day of April, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Martin I. Welsh, District Judge.

[Title of Cause.]

This case came on regularly this day for trial. The defendant Tony Legatos was present in court

with John L. Brannely, Esq., his attorney. The defendant Chris Maritsas was present in Court with Anthony Kennedy, Esq., his attorney. Thereupon the following named persons, viz: Leonard G. Manser, John M. Feiling, Richard L. Bloss, Nathan M. Sellers, William R. Giorgi, O. Goldblatt, Ida Hansen, Elizabeth Morgan, Leonard M. Flannigan, Ruth M. Dager, Grace Heil, Herbert F. Goodpastor, twelve good and lawful jurors were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Ordered that the further trial hereof be continued until April 10, 1946, and the jury, after being duly admonished by the Court, was excused until that time. [11]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Wednesday, the 10th day of April, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Martin I. Welsh, District Judge.

[Title of Cause.]

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial hereof was thereupon resumed. Mr. Seawell made a statement to the Court and jury for and on behalf of the United States. Leonard D. Sanderson, Alex B. Tschierschky, R. F. Love, La-

verne Lewis and Kenneth H. Butler were sworn and testified for and on behalf of the United States. Mr. Seawell introduced in evidence and filed U. S. Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32, and the United States rested. Mr. Kennedy and Mr. Brannely made a motion to suppress the evidence, and after hearing Mr. Seawell, Mr. Kennedy and Mr. Brannely, it is Ordered that the motion be and the same is hereby denied. Ordered that this case be continued until April 11, 1946, and the jury, after being duly admonished by the Court, was excused until that time. [12]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday, the 11th day of April, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Martin I. Welsh, District Judge.

[Title of Cause.]

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial hereof was thereupon resumed. Mr. Kennedy on behalf of the defendant Chris Andrew Maritsis made a motion for judgment of acquittal, which said motion was Ordered denied. Mr. Brannely on behalf of the defendant Tony Legatos made

a motion for judgment of acquittal, which said motion was Ordered denied. Edward T. Coghill, Walter E. Holmes, George E. Zoller, Chris A. Maritsis, Tony Legatos and Frank E. Elmer were sworn and testified for and on behalf of the defendants, and the defendant rested. The United States rested. Thereupon the evidence was closed. Mr. Kennedy on behalf of the defendant Chris Andrew Maritsis renewed his motion for judgment of acquittal, which said motion was Ordered denied. Mr. Brannely, on behalf of the defendant Tony Legatos, renewed his motion for judgment of acquittal, which motion was Ordered denied. After argument by the Attorneys to the Court, and Jury, it is Ordered that this case be and the same is hereby continued until April 12, 1946, and the jury, after being duly admonished by the Court, was excused until that time. [13]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Friday, the 12th day of April, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Martin I. Welsh, district Judge.

[Title of Cause.]

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the

further trial hereof was thereupon resumed. After instructions of the Court to the Jury, the Jury at 10:45 o'clock a.m. retired to deliberate upon its verdict. At 2:10 o'clock p.m. the jury returned into Court and on being asked if they had agreed upon a verdict, replied in the negative. After further instructions of the Court to the jury, the jury at 2:15 o'clock p.m. again retired to deliberate upon their verdict. At 4:55 o'clock p.m. the jury returned into Court and on being asked if they had agreed upon a verdict, replied in the negative. After further instructions of the Court to the jury, the jury at 5:00 o'clock p.m. again retired to deliberate upon their verdict. At 5:10 o'clock p.m. the jury returned into Court and on being asked if they had agreed upon a verdict, replied in the affirmative and returned the following verdict, which was Ordered recorded, viz:

"We, the Jury, find as to the defendants at the bar, as follows:

Chris Andrew Maritsis: Guilty on the First Count, Not Guilty on the Second Count.

Tony Legatos: Guilty on the First Count, Not Guilty on the Second Count.

N. M. Sellers, Foreman,"

and the jury, on being asked if said verdict as recorded is the verdict of the jury, each juror replied that it is. Ordered that the jury be excused from the further deliberations hereof, and that they be excused until April 16, 1946. It is further Ordered

that this case be and the same is hereby continued until April 17, 1946, for the matter of the pronouncing of judgment on the defendants hereof. It is further Ordered that the defendant be and they are hereby released on the bonds heretofore given for their appearance herein. It is further Ordered that the U. S. Marshal provide lunch for 12 jurors and two bailiffs. [14]

[Title of District Court and Cause.]

VERDICT

We, the jury, find as to the defendants at the bar, as follows:

Chris Andrew Maritsis: Guilty on the First Count, Not Guilty on the Second Count.

Tony Legatos: Guilty on the First Count, Not Guilty on the Second Count.

N. M. SELLERS,
Foreman.

[Endorsed]: Filed April 12th, 1946. [15]

[Title of District Court and Cause.]

MOTION UNDER RULE 29b FOR RENEWAL OF MOTION FOR JUDGMENT OF AC- QUITTAL, AND IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

Now comes the defendant Tony Legatos, and after motion for judgment of acquittal having been made and denied at the close of all evidence and a verdict

of guilty on the first count having been returned by the jury on April 12, 1946, renews said motion for judgment of acquittal as provided by Rule 29b and in the alternative files this his motion for a new trial, as follows:

The defendant Tony Legatos moves the court to grant him a new trial for the following reasons:

1. The court erred in overruling defendant's motion for dismissal of the first count of the Indictment.

2. The court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

3. The verdict is contrary to the weight of evidence.

4. The verdict is not supported by any and/or substantial evidence.

5. The court erred in overruling defendant's motion for the suppression of evidence made before trial, said motion being based on illegal search and seizures in violation of the 4th and 5th Amendments to the Constitution of the United States.

6. The court erred in overruling defendant's motion for suppression of evidence made during trial, said motion being based on illegal search and seizures, and in admitting, over opposition, the testimony of witnesses Sanderson, Tschersky and Love based upon such illegal search and seizures.

7. The court erred in admitting the testimony of the [16] witnesses Sanderson and Tschersky of conversations with the defendant Chris Maritsis before proof of the corpus delicti, to which testi-

mony opposition was seasonably made on behalf of defendants and both of them.

8. The court erred in charging the jury, and in refusing to charge the jury as requested in defendants' proposed instructions, and in particular in giving the erroneous instruction to the jury to the general effect that defendant Tony Legatos was bound at his peril for the act of his employee, Chris Maritsis, irrespective of lack of knowledge or intent on the part of Tony Legatos.

9. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstance:

The jury on two occasions requested advice from the court as to the law relative to the criminal liability of an employer for the acts of his employee, and the court refused over the objection of counsel to read any but a single instruction and failed to read instructions previously given by the court which which would have more correctly informed the jury of the necessity of wilful intent upon the part of the employer to violate the law.

Dated: April 15, 1946.

JOHN L. BRANNELLY,

Attorney for Defendant Tony
Legatos.

Copy received April 16, 1946.

EMMET J. SEAWELL,

Asst. U. S. Attorney.

By LORRAINE SOUZA.

[Endorsed]: Filed April 16, 1946. [17]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Wednesday, the 17th day of April, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Martin I. Welsh, District Judge.

[Title of Cause.]

This case came on regularly this day for a hearing on the motions for judgment of acquittal, for a new trial and for the matter of pronouncing judgment on the defendants herein. The defendant Tony Legatos was present in Court with John L. Branely, Esq., his attorney. The defendant Chris Andrew Maritsis was present in Court with Anthony J. Kennedy, Esq., his attorney. Emmet J. Seawell, Esq., Assistant U. S. Attorney, was present for and on behalf of the United States. After hearing Mr. Kennedy and Mr. Seawell, it is Ordered that the motions for judgment of acquittal and for a new trial be and the same are hereby Denied. The defendant Tony Legatos was called for judgment, and having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment

for the period of Two (2) Years, and that he pay a fine (to the United States in the sum of One Thousand (\$1000) Dollars on the First Count of the Indictment. It is further Ordered that in default of the payment of said fine, that said defendant be imprisoned until said fine be paid or until he be otherwise discharged by due process of law. Ordered judgment be entered herein accordingly. It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal, or other qualified officer, and that the same shall serve as the commitment herein. [18]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Wednesday, the 17th day of April, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Martin I. Welsh, District Judge.

* * * Mr. Brannely made a motion for the Court to reconsider the judgment imposed on the defendant Tony Legatos, and after hearing Mr. Brannely and Mr. Seawell, it is Ordered that the motion to reconsider be and the same is hereby Denied.

District Court of the United States
Northern District of California, Northern Division
No. 9522

UNITED STATES

vs.

TONY LEGATOS.

Criminal Indictment in Two counts for violation
of U.S.C., Title 26, Secs. 2871; 2803.

JUDGMENT AND COMMITMENT

On this 17th day of April, 1946, came the United States Attorney, and the defendant, Tony Legatos, appearing in proper person, and by counsel, and,

The defendant having been convicted on Verdict of Guilty of the offense charged in the 1st ct. of Indictment in the above-entitled cause, to-wit:

On the 18th day of July, 1945, defendant did wilfully, knowingly and unlawfully re-use liquor bottles, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Years and pay a fine to

the United States in the sum of One Thousand (\$1000.00) Dollars on the first count, and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

(Defendant found Not Guilty on the Second Count.)

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ MARTIN I. WELSH,

United States District Judge.

Examined by:

HARLAN M. THOMPSON,

Assistant U. S. Attorney.

The Court recommends commitment to United States Penitentiary.

Filed and Entered this 17th day of April, 1946.

/s/ C. W. CALBREATH,

Clerk.

By C. E. EVENSEN,

Deputy Clerk. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL OF TONY LEGATOS

Name and address of appellant: Tony Legatos,
1040 44th Street, Sacramento, California.

Name and address of appellant's attorneys: John
L. Brannely, Ochsner Building, Sacramento, Cali-
fornia; Anthony J. Kennedy, Forum Building, Sac-
ramento, California.

Offense: Violation of section 175.41 of Regulation
13, Traffic [21] in Containers of Distilled Spirits,
prescribed by the United States Treasury Depart-
ment, Bureau of Internal Revenue, under section
2871 of the Internal Revenue Code.

Verdict of guilty was returned by the jury on
April 12, 1946, and judgment of the court was
entered on April 17, 1946, which by its terms im-
posed a sentence of 2 years imprisonment in the
Federal penitentiary and payment of a fine of
\$1000.00, and that said defendant be further im-
prisoned until said fine is paid or until said defend-
ant is otherwise discharged as provided by law.

Defendant is not on bail and is now confined in
the Sacramento County jail.

I, the above named appellant, hereby appeal to
the United States Circuit Court of Appeals for the
Ninth Circuit, from the above stated judgment.

Dated: April 17, 1946.

TONY LEGATOS,

Defendant and Appellant.

JOHN L. BRANNELLY,

ANTHONY J. KENNEDY,

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed April 17, 1946. [22]

[Title of District Court and Cause.]

STIPULATION FOR ORDER AUTHORIZING
CLERK TO DELIVER EXHIBITS TO CIR-
CUIT COURT OF APPEALS

The United States of America by its Assistant United States Attorney, Emmet J. Seawell, Esq., and the defendant, Tony Legatos, through his attorneys, hereby stipulate that those certain exhibits heretofore offered by the Government in the above entitled proceedings and numbered one (1) to thirty-one (31), being bottles containing alcoholic beverages and offered in evidence in the above entitled proceedings, may be delivered to the Clerk of the Circuit Court of Appeals for the Ninth Circuit for use on the appeal taken thereto by defendant, Tony [23] Legatos, in the event said Circuit Court of Appeals may deem it necessary that such exhibits are required for its determination of the appeal taken by said defendant, Tony Legatos.

Dated: This 8th day of May, 1946.

FRANK J. HENNESSY,
United States Attorney.

By EMMET J. SEAWELL,
Assistant U. S. Attorney.

/s/ JOHN L. BRANNELLY,
/s/ ANTHONY J. KENNEDY,
/s/ ERNEST J. TORREGANO,
Attorneys for said Defendant,
Tony Legatos.

[Endorsed]: Filed May 8, 1946. [24]

[Title of District Court and Cause.]

ORDER DIRECTING CLERK TO TRANSMIT
ORIGINAL REPORTER'S TRANSCRIPT
TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO BE USED ON APPEAL.

Upon the application of Tony Legatos, one of the
defendants above named, and it appearing to be a
proper case for this order,

It Is Hereby Ordered that the Clerk of the above-
entitled Court be and he is hereby authorized, em-
powered and directed to transmit to the United
States Circuit Court of Appeals for the Ninth Cir-
cuit the original reporter's transcript and the origi-
nal supplemental reporter's transcript now on file
with the clerk of the above-entitled Court in the
above-entitled cause.

Dated: This 14th day of May, 1946.

MARTIN I. WELSH,
Judge of the U. S. District
Court. [25]

APPROVAL BY UNITED STATES
ATTORNEY

The foregoing proposed Order having been presented to the United States Attorney for approval, the same is hereby approved.

Dated: This 14th day of May, 1946.

FRANK J. HENNESSY,
United States Attorney.
By EMMET J. SEAWELL,
Assistant U. S. Attorney.

[Endorsed]: Filed May 14, 1946. [26]

[Title of District Court and Cause.]

REQUEST FOR CERTIFICATION AND FOR
TRANSMITTAL OF RECORD TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT
TO BE USED ON APPEAL.

To the Honorable, the United States District Court
for the Northern District of California, Northern
Division, and to the Clerk of said Court:

You will please certify and transmit to the Circuit Court of Appeals for the Ninth Circuit the

entire record and proceedings in the above entitled case to be used on the appeal of the defendant, Tony Legatos.

Dated: This 7th day of May, 1946.

/s/ JOHN J. BRANNELLY,

/s/ ANTHONY J. KENNEDY,

/s/ ERNEST J. TORREGANO,

Attorneys for said defendant,
Tony Legatos.

[Endorsed]: Filed May 7, 1946. [27]

**CERTIFICATE OF CLERK OF U. S. DISTRICT
COURT TO RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 27 pages, numbered from 1 to 27, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of the United States vs. Tony Legatos, No. 9522, as the same now remain on file and of record in this office; said record having been prepared pursuant to and in accordance with the Request for Certification and for Transmittal of Record, a copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing Record on Appeal is the sum of Eleven Dollars and Twenty Cents (\$11.20), and that the same has been paid to me by the attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and the official seal of said District Court, this 16th day of May, A.D., 1946.

[Seal]

C. W. CALBREATH,

Clerk.

By /s/ F. M. LAMPERT,

Deputy Clerk. [28]

In the District Court of the United States for the
Northern District of California, Northern
Division.

No. 9522

Before Honorable Martin I. Welsh, Judge.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

TONY LEGATOS,
Defendant.

REPORTER'S SUPPLEMENTAL
TRANSCRIPT

Appearances: For the Government: Emmet J.
Seawell, Esq., Assistant United States Attorney.
For the Defendant: Anthony J. Kennedy, Esq.,
and John L. Brannely, Esq. [209*]

Monday, January 21, 1946

MOTION TO SUPPRESS EVIDENCE

Mr. Kennedy: Your Honor, this is a motion to
return and suppress evidence. The petition recites
the facts that the indictment was returned against
the defendants, a plea of not guilty was entered,
that prior to the time the indictment was returned,
and on or about July 18, 1945, there was seized at
premises located at 621 K Street, 31 bottles con-

* Page numbering appearing at top of page of original Reporter's
Transcript.

taining liquor, then and there the property of the defendant, Tony Legatos, the bottles of which are described in the indictment; that the seizure was done by the United States, officials of the United States acting without any warrant of arrest or search or other information, who went into the premises without the authority of the owner and conducted a search on the premises without any right to do so whatsoever, following which they made the seizure; that the property is now in the hands of the officers, and we request a return of it.

I don't know to what extent Mr. Seawell, the United States District Attorney, desires to make a showing on the facts, but we will call one witness.

Will you take the stand, please, Mr. O'Leary?

TOMMIE O'LEARY,

called for the defendants, sworn.

Direct Examination

Mr. Kennedy: Q. Will you state your full name, please?

A. Tommie O'Leary.

Q. Will you speak a little louder, please, Tommie?
A. Tommie O'Leary.

Q. Yes. And where do you work?

A. Golden Tavern.

Q. And where is that located?

A. 621 K Street.

Q. And what business is conducted at that place, please?
A. It is a tavern.

(Testimony of Tommy O'Leary.)

Q. On sale of distilled spirits? A. Yes, sir.

Q. And what work do you do there?

A. I am the bartender.

Q. You will have to speak louder all the time, Mr. O'Leary, please. A. Bartender.

Q. And what hours do you work there?

A. From 9:00 to 5:00.

Q. And the place is—so far as its physical equipment is concerned, it is equipped with a bar on the west side, is it not? A. Yes, sir.

Q. And the bar is maybe some thirty feet long?

A. Yes, sir.

Q. And to the rear of the bar, on the north, there are tables? A. Yes, sir. [211]

Q. Do you recognize this gentleman here (indicating)? A. I have seen him before, yes.

Mr. Kennedy: May I have his name, please, Mr. Seawell?

Mr. Seawell: Sanderson.

Mr. Sanderson: Sanderson. Leonard D. Sanderson.

Mr. Kennedy: Yes. Now, did Mr. Sanderson come into the bar on the 18th day of July or thereabouts?

A. Yes, sir.

Q. In company with another gentleman?

A. Yes.

Q. Will you state now for the Court just exactly what they did, please? Tell the Court, please.

A. Well, he came in there and showed me his

(Testimony of Tommy O'Leary.)

badge. He told me he wanted to inspect the liquor in the back, back of the bar. He wanted to go on back, so I let him go.

Q. What did he do?

A. Well, he went back there and started looking all the bottles over.

Q. What else did they do?

A. As they were looking them over he was taking them out——

The Court: Q. Taking them out where?

A. On the table, on the bar.

Q. On the bar?

A. Well, right at the end of the bar, and then he put them on the table later.

Mr. Kennedy: Q. What bottles did they take?

A. He took the ones that were open. I don't know what kinds of whiskey. There were a half dozen different kinds, I guess.

Q. Where were the bottles located that they took?

A. They were on the back bar, on the shelf, display shelf.

Q. You say they took all the bottles?

A. The ones that were open.

Q. What do you mean, all the ones that were open? A. On the back bar.

Q. In other words, all the ones that had the corks open? A. Yes, sir.

Q. And the stamps broken? A. Yes, sir.

Q. Now, how many were there, please, how many men? You say "they." A. Two men.

(Testimony of Tommy O'Leary.)

Q. Someone else was with Mr. Sanderson?

A. Yes, sir.

Q. Now, will you state exactly what Mr. Sanderson said?

A. Well, he didn't say much to me, he just told me he wanted to go by the bar and look at the bottles.

Q. He came in at what time, please, Mr. O'Leary?

A. I don't know exactly what time; I imagine around—it was after—between 9:00 and 10:00, I imagine.

Q. Some time between 9:00 and 10:00 o'clock in the morning?

A. Yes.

Q. And was this other gentleman with him at all times?

A. Well, they were both there, yes, sir.

Q. Both together. And they acted together at all times? [213]

A. Yes.

Q. Now, when they first came in the bar, where did they go? Did they go to the service part of the bar?

A. No, they went around the back end of the bar and showed me their badge and that was all.

Q. That was all they did?

A. Yes.

Q. That is all they said?

A. Yes.

Q. And they proceeded then, you say, to take these bottles out from behind the bar?

A. Well, they went back there and examined them and looked at them and as they looked at them they took them out.

(Testimony of Tommy O'Leary.)

Q. And then what did they do with the bottles, remove them from the place? A. Yes.

Q. Was there anything other than the badge exhibited to you? A. No, sir.

Q. And did they remove from the place every bottle that had been opened?

A. I don't think they took the two bottles I was working with.

Q. In other words, you had two bottles in the slots where you were working and serving drinks?

A. Yes.

Q. —from behind the bar. And the bottles that they took were on the back bar, is that correct?

A. Yes.

Q. And they took every bottle that was open, is that your testimony? A. Yes, sir.

Q. And they first shook them up, you say, and then they [214] removed them from the place?

(No audible response.)

Mr. Kennedy: That is all.

Cross Examination

Mr. Seawell: Q. Just a moment. You are not the manager of this place, are you?

A. No, sir.

Q. You have no control over the operation of this bar? You simply work for Mr. Legatos, isn't that right? A. Yes.

Q. So you wouldn't know if they had authority from Mr. Legatos or from the Manager to search this place or to inspect it, would you?

(Testimony of Tommy O'Leary.)

A. No, I just seen the badge.

Q. I say, you don't know whether they had permission from Mr. Legatos to inspect the premises?

A. No, sir.

Q. You don't know what the law is under the statute as to whether an Internal Revenue Agent has a right under Section 3177 of Revised Statutes to inspect the premises such as these at any reasonable time, do you?

A. No, sir.

Mr. Seawell: That is all.

Mr. Kennedy: That is all. Call Mr. Legatos.

TONY LEGATOS,

one of the defendants, called for the defendants, sworn.

Direct Examination

Mr. Kennedy: Q. Mr. Legatos, you are the licensee at 621 K Street, are you not?

A. Yes, sir. [215]

Q. And do you know Mr. Sanderson?

A. I see him before. When I come inside I thought I had seen him some place.

Q. You have seen him? A. Yes.

Q. And did you give Mr. Sanderson or his partner—I believe it was Mr. Toschierschey—

The Reporter: How do you spell that?

Mr. Sanderson: T-o-s-c-h-i-e-r-s-c-h-e-y.

Mr. Kennedy: Q. And he is a Revenue Officer, is he not?

(Testimony of Tony Legatos.)

Mr. Seawell: He is no longer with the government. He was at that time.

Mr. Kennedy: Q. Did you give Mr. Sanderson permission to enter your premises and make a search on the morning of July 18th? A. No.

Q. Did you know that he was making that search? A. No.

Q. And the search was done entirely without your knowledge or authority?

A. That is right.

Mr. Kennedy: That is all.

Cross Examination

Mr. Seawell: Q. You say you have a license. What kind of a license? A. On sale license.

Q. To sell what? A. Liquor.

Q. And did you apply under a form with the Federal Government for a stamp to operate your place of business? A. Yes, sir.

Q. You paid a special tax as provided by Sections 3250 to [216] 3275, is that correct, Title 26 of the Internal Revenue Code?

A. I paid the tax.

Q. You paid your special tax, in other words, to operate your business. You are familiar with Section 3277 of Revised Statutes which allows an Internal Revenue Agent to inspect your premises at will, are you not?

Mr. Kennedy: Object to that as calling for a conclusion of the witness on the law.

A. I don't know.

(Testimony of Tony Legatos.)

Mr. Seawell: I am asking him if he knows the law under which he operates his premises?

A. I don't know.

Mr. Seawell: Q. Are you familiar with the Section of the Revised Statutes that allows an Internal Revenue Agent to enter your premises—Section 3177 of Revised Statutes which provides that any Inspector, Collector, Deputy Collector or Internal Revenue Agent may enter in the day time any building or place where any object or objects subject to tax are made or kept within this district wherever it is necessary for the purpose of examining such business? Are you familiar with that?

Mr. Kennedy: Your Honor, I object to that as incompetent, irrelevant and immaterial, and the further objection that as to the law the witness is presumed to know it, but it calls for a conclusion of the witness on the law. If Mr. Seawell wants to turn this into a legal argument, I think it will be better to take it up at the end of the taking of [217] testimony.

Mr. Seawell: Q. Mr. Legatos, did you have a Manager to take care of your place?

A. The manager is Nick Tiodoritus.

Q. And he was working there that day, was he not, the 18th day of July, 1945?

A. He wasn't working that day, he was sick?

Q. He was in the premises, was he not?

A. I don't know if he was in the premises or not.

Q. You don't know actually whether or not the

(Testimony of Tony Legatos.)

agents came in and asked him if they could inspect the premises, do you?

A. I wasn't there myself.

Q. You don't know? A. No.

Q. He had authority to operate the premises?

A. When the manager was there he had the authority. I don't know nothing about the other—

Q. He did have authority to conduct the business when you weren't present?

A. That is right.

Q. What?

The Court: He said that is right.

Mr. Seawell: That is all.

CHRIS MARITSAS,

one of the defendants, called for the defendants, sworn.

Direct Examination

Mr. Kennedy: Q. Your name is Chris Maritsas? [218]

A. Chris Maritsas, yes, sir.

Q. And you are the head bartender down at 621 K Street for Tony Legatos? A. Yes.

Q. And you have general charge and supervision of the place? A. Yes, sir.

Q. And on July 18th of this year were you present when Mr. Sanderson and another agent for the government came into the place?

A. No, I wasn't in there.

(Testimony of Chris Maritsas.)

Q. You weren't there when they first came?

A. No, I wasn't.

Q. As a matter of fact, Tommie O'Leary, the bartender who just testified, was there alone?

A. He was there alone.

Q. It was his shift?

Mr. Seawell: I object as calling for a conclusion. He testified he wasn't there. I don't know how this man would know who was there.

Mr. Kennedy: It may be hearsay. I will put him on if there is any question about that, Mr. Seawell?

Mr. Seawell: He testified he wasn't there. He couldn't possibly know who was there if he wasn't there.

Mr. Kennedy: I will straighten that out. You got in about what time?

A. About 12:00 o'clock, I guess. A little before or a little after; something like that.

Q. And prior to the time you got there they had removed the [219] bottles which we seek the return of?

Mr. Seawell: I object to that as incompetent, irrelevant and immaterial and also hearsay as to this man. He stated he wasn't there.

The Court: Objection is sustained.

Mr. Kennedy: Q. You left the bar the night before, did you not? A. Yes, sir.

Q. And at that time the back bar had approximately how many bottles?

(Testimony of Chris Maritsas.)

A. I never counted. I don't know how many I had in there.

Q. Well, can you give us any idea?

The Court: You have to guess.

A. Oh, about 60 or 70 bottles altogether, both ends, both set-ups.

Q. Now, when you came in the next day, as you say about noon, were there bottles behind the back bar which had been opened, were they gone from the place?

A. I never seen no bottles there when I got there.

Q. Were they gone?

A. Yes, I didn't see them any place around.

Q. Well, they weren't there?

A. No, they wasn't there.

The Court: Q. Did you examine to see if they were there?

A. I didn't examine, but I can see where I get in there there is no bottles in there. [220]

The Court: Proceed.

Mr. Kennedy: Q. Now, did you give anyone permission to enter the premises?

A. No, no, I didn't.

Q. And to take those bottles from there?

A. No.

Q. At any time? A. No, at no time.

Mr. Kennedy: That is all.

Cross Examination

Mr. Seawell: Q. You know Mr. Tiodoritus?

A. Yes.

(Testimony of Chris Maritsas.)

Q. And he is the manager of the place, isn't he?
A. Yes.

Q. And you don't know if he was there on the 18th day of July and gave permission to these men to examine or inspect your place, do you?

A. I came about 12:00 o'clock, I don't know——

Q. You came about 12:00 o'clock, and you weren't there before, were you?
A. No.

Q. And you aren't the manager?

A. Well, when Nick is out——

Q. Mr. Tiodoritus is the manager, isn't he?

A. Yes.

Q. You don't know what happened then before 12:00 o'clock, do you, that 18th day of July, 1945?

A. No, I don't.

Mr. Seawell: That is all.

Mr. Kennedy: That is all. I will call Mr. Sanderson. [221]

LEONARD D. SANDERSON,

called for the defendant, sworn.

Direct Examination

Mr. Kennedy: Q. Your name is Mr. Leonard D. Sanderson?
A. Yes, sir.

Q. And you are investigator for the Alcohol Tax Unit?

A. Inspector for the Alcohol Tax Unit.

Q. Yes. And you were on July 18th of this year?

A. Yes, sir.

(Testimony of Leonard D. Sanderson.)

Q. And on or about that date, together with Mr. —How do you pronounce that?

A. Toschierschey.

Q. Toschierschey? A. Yes, sir.

Q. You went into the premises at 621 K Street?

A. Right.

Q. You had no search warrant?

A. No search warrant, no, sir.

Q. And when you went there you went behind the bar?

A. We presented our credentials to Mr. O'Leary and told him what our mission was, to inspect their stock of bottled spirits.

Q. You told him what?

A. We told him we were there to inspect the stock of bottled spirits in open bottles.

Q. And with that you went to the back bar?

A. Yes.

Q. And you removed every open bottle?

A. No; I would say approximately 40 bottles. We took those to the rear where there were no customers, to a little table, to conduct [222] our inspection, our tests.

Q. And you had no permission from the owner, Mr. Legatos?

A. No, sir. I hadn't seen him.

Q. And it was done without his knowledge?

A. No, I hadn't seen Mr. Legatos.

Q. And you had no permission from Mr. Maritsas?

A. Mr. Maritsas wasn't there at the time. Mr.

(Testimony of Leonard D. Sanderson.)

Tiodoritus was there during all our inspection. He was the manager.

Q. Was he there when you went in?

A. No.

Q. What time did he come in?

A. He came in fifteen minutes after we entered the premises.

Q. How long was he there, please?

A. He was there all during the time of our inspection.

Q. Was he there when you took the bottles from behind the bar? A. Yes, sir.

Q. All the time? A. Yes, sir.

Q. And did you have any conversation with him?

A. Yes. After we had discovered there were 32 refilled bottles, and he was present all during the inspection, and we asked him if he had any knowledge as to how those bottled spirits got that way and he had absolutely no knowledge.

Q. About what time did he come?

A. We went in about 10:00 o'clock and I should judge about 10:15 or 10:20 Mr. Tiodoritus came in.

Q. What had you done before Mr. Tiodoritus came in? [223]

A. We had taken the bottles to the table in the rear.

Q. And you were doing what?

A. Testing with a Williams' testing set.

Q. What is the Williams' testing set?

A. It is a field equipment we have to test bot-

(Testimony of Leonard D. Sanderson.)

tled spirits before we take them into the Bureau chemist.

Q. And you had completed your test before Mr. Tiodoritus came in?

A. No, sir, not completed it.

Q. How far had you proceeded with it?

A. I should judge we had checked a few bottles and found out that the contents did not conform to the labels.

Q. Mr. Tiodoritus was there how long?

A. We were there, I should judge, about three hours, three hours and a half.

Q. And he was there all that time?

A. Yes, sir.

Q. What was your conversation with Mr. Tiodoritus?

A. Well, when we found a bottle that the contents did not conform with the label, why, we showed him the test and asked him if he knew anything about how they got that way and he said he had been home sick, home ill and could not explain how the contents got that way.

Q. Did you know Mr. Tiodoritus before that time?

A. No, sir, I had never seen him.

Q. And he came in after you had removed the bottles from the back bar?

A. From the back bar to a table [224] in the rear of the bar.

Q. And you discovered what in the bottles, please?

(Testimony of Leonard D. Sanderson.)

A. Well, of the 32 bottles we had removed, of the 32 there were 14 bottles that had been filled with parts of rum and Schenleys and Mr. Maritsas came in the next day——

Q. Parts of what?

A. Rum and Schenleys.

Q. Schenley's?

A. Schenley's blended whiskey and rum, 14 bottles. Mr. Maritsas came in the next day and we asked him about the bottles, how they got that way——

Q. What day, please?

A. That would be the 19th.

Q. The next day?

A. Yes. And he said he had refilled 14 bottles himself personally with parts of rum and Schenley's blended whiskey, and the other 18 bottles he said the bartenders were dumping those from one bottle to the other at the end of the day's business. If they had a small portion in the bottle they would put them together.

Q. This was on the 19th?

A. This was on the 19th. Mr. Legatos was present also.

Q. Now, going back to July the 18th, the day you made your search, did you have instruments insofar as that Williams' test is concerned?

A. Yes, sir. We have a re-agent and a small tube about a foot high or long, I should say, where we conduct our tests.

(Testimony of Leonard D. Sanderson.)

Q. When you first went in there you showed your badge of authority to Tom O'Leary? [225]

A. Showed our credentials, yes.

Q. And then you went back of the bar and took the open bottles out? A. That is right.

Q. Other than the bottles he had in the slots at the time? A. Yes, that is right.

Q. And took those in the back part of the bar—not on the far end of the bar, but in the rear of the bar on a table? A. Yes.

Q. And sat down and made tests? A. Yes.

Q. And from the tests you made you drew your conclusion that there were substances in the bottle that were other than on the brands? A. Yes.

Q. Then Mr. Tiodoritus came in? A. Yes.

Q. Now, let me have the conversation with Mr. Tiodoritus, please?

A. Mr. Tiodoritus was down in the basement working on some invoices when we were working on the tests, and as soon as we found a bottle that was bad we would take the bottle down to him and showed him the tests and he could not explain it because he said he was home ill.

Q. Was that the entire conversation you had with Mr. Tiodoritus? A. Yes, sir.

Q. That was the only conversation you had with him? A. Yes.

Q. Now, just to refresh your recollection as to whether Mr. [226] Tiodoritus was or was not there, isn't it a fact that after you made your examination, Mr. Sanderson, of these bottles, that you asked

(Testimony of Leonard D. Sanderson.)

Mr. Tommie O'Leary, the bartender, where the other liquor was kept?

Mr. Seawell: Just a moment. I object to this as cross examination of his own witness.

The Court: Sustained.

Mr. Kennedy: I don't believe that question is objectionable, your Honor.

The Court: The Court has ruled.

Mr. Kennedy: Pardon me?

The Court: I say the Court has ruled.

Mr. Kennedy: Q. Now, did you inspect the liquor room?

A. Yes, sir,—the stock room?

Q. Yes? A. Yes.

Q. And you requested Mr. Tommie O'Leary for the keys? A. I don't recall that.

Q. But he did show you the beer room, didn't he? A. Yes, sir.

Q. And he told you he didn't have the keys to the liquor room? A. Yes, sir.

Mr. Seawell: Just a moment. This is your witness, Mr. Kennedy. You are going at him like you are cross-examining him. Ask him questions and let him answer.

Mr. Kennedy: I have asked him questions. [227]

Mr. Seawell: Will you read that last question, Mr. Reporter?

(Record read.)

Mr. Kennedy: The question has already been answered.

The Court: It has been answered.

(Testimony of Leonard D. Sanderson.)

Mr. Kennedy: Q. So it was necessary to wait for Mr. Tiotoritus to come down and get the keys to the liquor room? A. That is right.

Q. And that was some time later?

A. I should judge about 10:30. We entered the premises about 10:00 o'clock and about 10:30 we got the keys.

Q. Yes, but after your preliminary inspection had been completed?

A. The inspection was not completed. It takes three hours to complete the inspection.

Mr. Kennedy: That is all.

Cross Examination

Mr. Seawell: Q. You are Inspector for the United States Bureau of Internal Revenue, is that correct?

A. Yes, sir.

Q. What does your authority consist of insofar as going into bars where distilled spirits are sold?

Mr. Brannely: Your Honor, that is objected to as calling for a conclusion of the witness on a question of law. That is a question of law.

Mr. Seawell: May it please the Court, I have a right [228] to ask him——

The Court: Overruled.

Mr. Seawell: Q. What authority did you have to go into these premises?

A. Well, we make routine inspections, periodic inspections of various bars, maybe once every six months or three months we go into a bar and in-

(Testimony of Leonard D. Sanderson.)

spect it for revenue stamps, wine stamps, bootleg whiskey—well, there are many things we inspect—license—to see if the licenses are up to date.

Q. Well, who instructs you to do this?

A. Well, we get our instructions from our Inspector, Chief Inspector.

Q. From the Department of Internal Revenue?

A. From the Department of Internal Revenue.

Q. And did you inspect these premises that you went into——

A. 621 K Street.

Q. ——that you refer to? A. Yes, sir.

Q. Did anyone object to the search?

A. No, sir.

Q. And did the manager request you to leave the premises? A. No, sir.

Q. And did you use any force or duress in inspecting these premises? A. Absolutely not.

Mr. Seawell: That is all.

Mr. Kennedy: That is all.

Mr. Seawell: Are you through? [229]

Mr. Kennedy: Yes.

(Argument.)

The Court: Motion submitted?

Mr. Seawell: Motion submitted.

The Court: Motion denied.

Mr. Kennedy: May an exception be noted?

The Court: Yes. [230]

In the District Court of the United States, for the
Northern District of California, Northern
Division

Before Honorable Martin I. Welsh, Judge.

No. 9522

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TONY LEGATOS and

CHRIS ANDREW MARITSAS,

Defendants.

REPORTER'S TRANSCRIPT

Appearances: For the Government: Emmet J. Seawell, Esq., Assistant United States Attorney. For the Defendant: Tony Legatos: John L. Branely, Esq. For the Defendant: Christ Andrew Maritsas: Anthony J. Kennedy, Esq. [1]

Tuesday, April 9, 1946, 10:00 o'clock a.m.

(A jury was duly impaneled and sworn to try the case.)

(Thereupon adjournment was taken until Wednesday, April 10, 1945, at 10:00 o'clock a.m.) [4]

Wednesday, April 10, 1946, 10:00 o'clock a.m.

The Clerk: United States vs. Tony Legatos and Chris Maritsas.

Mr. Seawell: Ready.

Mr. Brannely: Ready, your Honor.

Mr. Kennedy: Ready.

The Court: Call the roll of jurors.

(Roll called.)

The Clerk: They are all present, sir.

The Court: You may proceed.

OPENING STATEMENT ON BEHALF OF THE GOVERNMENT

Mr. Seawell: Counsel, may it please the Court, ladies and gentlemen of the jury:

The Government intends to prove in this case that on or about the 17th day of July, 1945, two Alcohol Tax Unit Agents in the performance of their duties went to a bar which is owned and operated by Mr. Tony Legatos, six hundred something K Street; that as they went into the bar it was after 10:00 o'clock in the morning; that they asked the bartender—told him what their duties were—to look at the license and a routine check-up, to check up their liquor to see if it came up to the standards prescribed by law; that the bartender [5] told them to go ahead; that they went ahead and examined the bottles which were open and setting behind the bar and around and about the premises; that they examined these bottles, tested them, and came to the conclusion that at least thirty odd bottles had

been adulterated—that is, that either caramel or other substances had been added to straight whiskey; that in the case of 14 bottles of Schenley's whiskey, rum had been added; that in the case of 8 bottles of straight whiskey—whiskey such as Old Forester, et cetera—the proof was not 100 proof, apparently some substance had been added.

The Government will prove that the agents seized these thirty-odd bottles that we will submit in evidence later in this case, and that they later submitted them to the United States chemist, Mr. Love, who has been a chemist in the United States Government for some twenty-odd years; that he made the recognized tests and found in each case that the bottles contained substances that could not be in them—that in 18 cases rum had been added to the whiskey, and in the other bottles caramel or some substance had been added to make it taste and look like straight whiskey when in fact it wasn't.

The Government will prove that as a matter of fact the defendant, Christ Maritsas, was not present at that time, however, they stated they would come back the next morning and told the bartender and requested he have the manager there. [6]

The next morning the agents went back, and at that time the defendant, Chris Maritsas, was present, and also Mr. Tony Legatos.

In other words, we will show that he immediately came down and saw something was wrong, and at that time Chris admitted that he had actually filled 14 of these bottles with rum, and as a matter of fact

I will prove that he has admitted it several times, even before the United States Commissioner.

We will prove, as a matter of fact that Tony Legatos owns a number of bars in Sacramento and Vallejo; that he had an over-stock of rum; that he had some fifty-odd cases of rum in one of his places of business; that he—we will prove it from his secretary—that he directed that that rum be disposed of. He said, “I have too much rum; I can’t afford to keep it; we will have to dispose of it in some way.”

And thereafter this rum was added to the bottles of whiskey which he sold as straight whiskey, and for which the people paid their good money and received a product not as represented.

Mr. Sanderson, will you take the stand? [7]

LEONARD D. SANDERSON,

called for the Government; sworn.

Direct Examination

Mr. Seawell: Q. What is your occupation?

A. I am Inspector for the Bureau of Internal Revenue, Alcohol Tax Unit.

Q. How long have you been so employed?

A. Two years.

Q. And were you so employed on the 17th and 18th days of July and thereabouts?

A. Yes, sir.

(Testimony of Leonard D. Sanderson.)

Q. 1945. Did you have occasion to visit Sacramento around about that time? A. Yes, sir.

Q. And did anyone accompany you to Sacramento?

A. Yes, sir, Inspector A. G. Tschierschky.

Q. And did you visit any bars on that occasion? A. Yes.

Q. Particularly, did you visit a place known as the Golden Tavern at 621 K Street, Sacramento?

A. Yes, sir.

Q. And when did you go to that bar?

A. Approximately 10:00 A.M. on July 18, 1945.

Q. And who was with you?

A. Inspector Tschierschky.

Q. And how did you gain entrance to the bar?

A. The doors were open and there were people sitting at the bar drinking and we walked in and presented our credentials to a bartender by the name of Tommy O'Leary. [8]

Q. Was there anyone else in authority present at that time, any bartenders?

A. Not at that time. There was a bartender there, but he wasn't on duty.

Q. He wasn't working? A. No.

Q. What did you say to the bartender, and what did he say to you?

Mr. Brannely: Objected to as hearsay, your Honor, incompetent, irrelevant and immaterial.

Mr. Kennedy: Same objection as to the defendant Maritsas.

(Testimony of Leonard D. Sanderson.)

Mr. Seawell: It simply goes to the search and visit.

Q. At any event, after you did present your credentials to the bartender, what did you do?

A. We told the bartender what our mission was.

Mr. Kennedy: Pardon me, your Honor. May this statement as to the bartender go out? This witness on the stand is a government agent of years' experience, and he knows what is testimony. He was asked what he did. Let him state the facts.

The Court: Overruled. Proceed.

A. Inspector Tschierschky and I went behind the back bar and we removed, after inspection, various bottles. We removed approximately forty bottles and took them to the rear booth.

Q. Why did you remove those bottles?

A. We suspected them of having been refilled.

Mr. Kennedy: Just a moment. We ask that that go out and the——

Mr. Seawell: That may go out.

Q. Just state what was your purpose in removing the bottles.

A. These bottles were being tested by the Williams Alcohol Test Set.

Q. You were going to test these bottles?

A. Yes.

Q. Did you have equipment to make such a test with you? A. Yes, sir.

Q. And what did you do with those bottles, where did you take them?

A. To a rear booth at the rear table.

(Testimony of Leonard D. Sanderson.)

Q. What did you do?

A. We took the Williams Test Set to the 40 bottles that had been removed.

Q. What is the Williams Test Set?

A. The Williams Test Set is a field equipment we have which will show whether blended spirits has been put in straight whiskey or the bottle has been diluted with water or liquids other than whiskey have been put in the bottle.

Q. You applied that test to these 40 bottles you mentioned? A. Yes.

Q. And what was the result of the test?

Mr. Kennedy: Objected to as incompetent, irrelevant and immaterial, calling for a conclusion of the witness. The Williams Test has not been identified except on the word of [10] the witness. We have no idea what it is at all.

Mr. Seawell: Q. How did you happen to apply the Williams Test?

A. I had a Williams Test Set with me.

Q. Where did you obtain it?

A. This came from the Chemical Laboratory of the Bureau of Internal Revenue in San Francisco.

Q. What is the purpose of this test?

Mr. Brannely: That calls for a conclusion of the witness.

The Court: If he knows.

Mr. Seawell: Q. Yes, if you know.

The Witness: What is the question, please?

Mr. Seawell: Q. Do you know what this test

(Testimony of Leonard D. Sanderson.)

is used for? In other words, what do you use this to test, what products?

A. Distilled spirits.

Q. And how do you tell whether or not—for example, if you took a Schenley bottle—I will withdraw the question at this time. First I will show you a number of bottles. I will show you this case which is sealed, which I just opened, and ask you if you can recognize this case.

A. Yes, sir.

Q. How do you recognize it?

A. By the seal it has on top of the case principally, and signed by Dr. Love.

Q. In your presence?

A. In my presence.

Q. Now I will ask you to open that case and take out the bottles in that case, and ask you if you have ever seen [11] these bottles before. Take out one at a time.

A. Yes, sir, I have.

Q. You have handed me here a bottle of Schenley Reserve blended whiskey. Where did you see that bottle the first time?

A. In the back bar of Tony Legatos' bar, 621 K Street.

Q. How do you recognize that bottle?

A. By my initials and Mr. Tierscheschky's initials on one side and Mr. Theodoratus' initials on the other side.

Mr. Seawell: At this time I will offer for identification as Government's Exhibit 1 the bottle of Schenley Reserve blended whiskey identified by

(Testimony of Leonard D. Sanderson.)

the witness—it has a number on it, 149425—as Government's Exhibit number 1.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 1 for identification.)

Mr. Seawell: Q. All right, will you proceed to take out the rest of the bottles? Here is a bottle with the number 149424 on it. Where did you see that bottle before?

A. In the back bar of Tony Legatos' bar at 621 K Street, Sacramento.

Q. How do you recognize that bottle?

A. By my initials on one side and Mr. Theodoratus' initials on the other side and strip stamps.

Mr. Seawell: At this time I offer this bottle as [12] Government's exhibit for identification number 2.

Mr. Kennedy: Your Honor, we have an objection as soon as the motion proceeds a little further upon what Mr. Sanderson did. Just in the interest of time, if Mr. Seawell could restrict himself to one bottle and go on with the alleged search and seizure that he conducted, I think we will proceed a lot faster.

Mr. Seawell: I will proceed in the ordinary course, may it please the Court.

Mr. Kennedy: Then, your Honor, at this time, exercising our rights as to the defendants Legatos and Chris Maritsas, may we ask some preliminary questions of the agent as to the type of investigation he made?

(Testimony of Leonard D. Sanderson.)

The Court: When your time comes, you may do that.

Mr. Kennedy: Pardon me, your Honor?

The Court: When your time comes, you may do that.

Mr. Kennedy: Your Honor, I believe we have the right on the question of search and seizure to ask preliminary questions before the evidence is offered,—before the material is offered in evidence, so that we may lay our proper foundation.

Mr. Seawell: It has not been offered in evidence.

Mr. Kennedy: Or for identification.

Mr. Seawell: It has only been offered for identification. I have no objection if he wants to ask the agent any question [13] at this time—in regard to search and seizure, is that correct?

Mr. Kennedy: That is correct.

Mr. Seawell: Proceed.

Mr. Kenndy: Q. Now, Mr. Sanderson, you didn't have a warrant? A. No, sir.

Q. Of any kind? A. No, sir.

Q. And you went there without a warrant absolutely, and you went into the bar and just took a look behind the bar first? A. No, sir.

Q. What did you do first, sir?

A. We presented our credentials to the man in charge, who was Mr. Tom O'Leary.

Q. Yes. And how long is the bar, please?

A. How long?

Mr. Seawell: I object to that as incompetent,

(Testimony of Leonard D. Sanderson.)

irrelevant and immaterial and no bearing on the search and seizure how long the bar is.

Mr. Kennedy: Q. The bar is about thirty feet long, is it not?

Mr. Seawell: Oh, I object to Mr. Kennedy testifying, may it please the Court.

The Court: Ask questions.

Mr. Kennedy: I beg your pardon?

The Court: Ask questions.

Mr. Kennedy: I was asking how long the bar was.

Mr. Seawell: I object to that as incompetent, irrelevant [14] and immaterial.

The Court: Sustained.

Mr. Kennedy: And, after you presented you credentials, what did you do?

A. We went behind the back bar and checked over the licenses first, went behind the back bar and there were 40 bottles in the back bar.

Q. And you took them out from behind the bar and put them where?

A. A small table in a booth at the rear of the bar.

Q. You aren't a chemist, are you?

A. I am not.

Q. And you have no technical training in these things? A. I have not.

Q. And the so-called Williams Test, the only thing you know about that is what is written in the circular that the company dispenses?

A. We have no circular on the Williams Test

(Testimony of Leonard D. Sanderson.)

Set. We go through a schooling in San Francisco and pass an examination on refilled bottles and taxes and various rules and regulations of the Bureau of Internal Revenue, before we are sent into the field.

Q. Yes, according to the instructions of the company? That is, the manufacturer of the instrument known as the Williams Test, isn't that correct?

A. I have never seen any directions. The inspectors receive their instruction from Dr. Love in his laboratory in San [15] Francisco.

Q. Now the Williams Test consists of—the so-called Williams equipment is a tube, is it not, a graduated tube? A. That is right.

Q. Along with a chemical compound that you use in connection with distilled spirits?

A. That is right.

Q. And in order to use the Williams test it is necessary to take from a bottle a portion of the material that is in the bottle, put it in the tube and rinse out the tube, is that not correct?

A. That is correct.

Q. And you throw that away?

A. That is right.

Q. Then you take some more of the——

Mr. Seawell: I am going to object to this as outside of the search and seizure. I thought Mr. Kennedy was going to examine this man at this time on search and seizure. He is talking about a chemical analysis.

(Testimony of Leonard D. Sanderson.)

Mr. Kennedy: The matter of search and seizure, Mr. Seawell, boils down to this: That this man took some material out of a bottle, put it in a test tube, rinse out the test tube and threw it away. Now what right a government agent has to do that I don't know. As a matter of fact, it is illegal——

Mr. Seawell: It is not illegal. I will refer to the United States Code——

Mr. Kennedy: May I complete my examination, your Honor? [16]

Mr. Seawell: Just a moment, You asked me a question, Mr. Kennedy. I don't want to leave an erroneous impression with the jury, may it please the Court.

There is a specific section of the United States Code which allows inspectors, revenue agents, such as Mr. Sanderson, to go into a bar and inspect it for the safety of the public and see whether or not the liquor in these places is as advertised and stated on the labels, and further gives them the authority to check for stamps, licenses, et cetera. I have a long brief on that and many cases to support it.

Mr. Kennedy: As far as the safety of the public is concerned, the 21st Amendment turns over to the States the entire matter of police power and regulation on alcoholic beverages, leaving to the Internal Revenue Department the matter of taxes.

Mr. Seawell: May I be excused just one mo-

(Testimony of Leonard D. Sanderson.)

ment, may it please the Court? I left my authorities in the other room.

(Mr. Seawell leaves the court room and returns.)

Mr. Seawell: May it please the Court, Section 3600 of the Internal Revenue Code reads as follows:

“Every collector shall, from time to time, cause his deputies to proceed through every part of his district and inquire after and concerning all persons therein who are liable to pay any internal revenue tax, and all persons owning or having the care and management [17] of any objects liable to pay any tax, and to make a list of such persons and enumerate said objects.”

Section 3170 of the Internal Revenue Code reads as follows:

“The secretary is authorized to confer and impose upon the Commissioner and any of his assistants, agents, or employees, and upon any other officer, employee or agent of the Treasury Department, any of the rights, privileges, powers, duties and protection conferred or imposed upon the secretary, or any officer or individual of the Treasury Department, or by any law now or hereafter in force relating to the taxation, exportation, transportation, manufacture, possession or use of, or traffic in, distilled spirits, wine, fermented liquors, or denatured alcohol.”

Now Section 3601(a)1 reads as follows:

“1. Entry during day. Any collector, deputy

(Testimony of Leonard D. Sanderson.)
collector, internal revenue agent, or inspector, may enter, in the daytime”—as here—“any building or place where any articles subject to tax are made, produced, or kept”—and he testified they were kept—“within his district so far as it may be necessary for the purpose of examining said articles or objects.”

I think that is certainly clear so far as the authority for the Internal Revenue agents to go into this place.

Mr. Kennedy: Was that last Section cited Section 3601? There is no Section 3601——

Mr. Seawell: Section 3601(a)1. [18]

The Government submits this man had authority to go into the place, may it please the Court——

Mr. Kennedy: Your Honor, I hadn't completed my examination.

Q. So far as the Williams Test is concerned, then, you took a portion out of the bottle, put it in a tube, and threw it out?

Mr. Seawell: I am going to object to this. It is not in regard to the search and seizure. This was preliminary to one purpose, if there was any illegal search and seizure. Now he is talking about the chemical analysis.

The Court: Go ahead; proceed.

Mr. Kennedy: Will you answer the question?

The Court: No. Mr. Seawell, you go ahead.

Mr. Seawell: You sustained the objection to going into this line of testimony at this time?

The Court: Yes.

(Testimony of Leonard D. Sanderson.)

Mr. Kennedy: Your Honor, I haven't made my motion for suppression, I haven't argued the matter. May I give you the points and authorities?

The Court: You don't have to do that. Just get along. You will have your time. Mr. Seawell has his time now and you will have your time. All you have to do is make a motion.

Mr. Kennedy: At this time I move that any evidence relative to the search and seizure made by Mr. Sanderson be [19] excluded from the case on the ground that it was in contravention of defendant's rights under the 4th and 5th Amendments of the Constitution and not pursuant to any provisions of the Internal Revenue laws.

That is, the sections cited by Mr. Seawell don't give any right to take anything whatsoever from any bottle in the aid of making any inspection or search, but that the sole authority of the officers of the Internal Revenue Department or the Alcohol Tax Unit under the sections of the law cited by Mr. Seawell, according to judicial decisions, the memorandum of which has already been filed with the Court, is to look in to see—in other words, to count and to look. And they have no right to take anything from a bottle whatsoever.

Mr. Brannely: Your Honor, before your Honor rules on the motion, in order to protect the record, I would like to join in the motion on behalf of the defendant, Mr. Tony Legatos, the motion just made by Mr. Kennedy to suppress the evidence, on the ground of illegal search and seizure.

(Testimony of Leonard D. Sanderson.)

On behalf of the defendant, Mr. Legatos here, your Honor, I think the evidence clearly shows that his property was taken without a search warrant, that he gave no one permission to take that property, that he wasn't present at the time the property was taken, that no search warrant has been obtained by the officers who made the illegal search and [20] seizure, and I want, on behalf of my client, Mr. Legatos, to join in that motion, your Honor, to suppress that evidence.

Mr. Seawell: Of course, that is not necessary, may it please the Court. This is a man working under a license. Where you have a license the situation is different. The United States Congress has provided how far the agent may go in examining the records and enforcing the law.

The Court: Take a short recess. Ladies and gentlemen, we will recess for a short time. Please remember the admonition heretofore given you by the Court.

(The jury retired.)

Mr. Seawell: If your Honor is going to take this matter under advisement, I have a brief I would like to submit on the situation.

(Recess.)

The Court: Call the roll of jurors.

(Roll called.)

The Clerk: They are all present, sir.

The Court: The motion of defendants to suppress evidence is denied.

(Testimony of Leonard D. Sanderson.)

Mr. Seawell: Q. Mr. Sanderson, I believe when we started arguing about the suppression of evidence, we had proceeded to the point where you had gone into the establishment. Did you say you looked at—did you check the stamps and licenses when you went in? A. Yes, sir. [21]

Q. And who owns these premises?

A. Tony Legatos.

Q. He is a licensee?

A. A licensee, both Federal and State licenses.

Q. You then took some 40 bottles to the rear of the room, is that correct?

A. That is correct.

Q. And I had introduced one bottle of Schenley's Reserve blended whiskey as Government's Exhibit 1 for identification, and I had showed you the second bottle. A. Yes, sir.

Q. Did you desire to look at these?

Mr. Brannely: No.

Mr. Seawell: I will offer this bottle if Schenley's Reserve whiskey as Government's Exhibit 2 for identification.

(The bottle referred to was marked U. S. Exhibit 2 for identification.)

Mr. Seawell: Q. Now did you take another bottle of liquor from the same place?

(The witness produces a bottle.)

Q. You have handed me a bottle of Schenley's whiskey with a number 149426 on it? A. Yes.

Q. Did you ever see this bottle before?

(Testimony of Leonard D. Sanderson.)

A. I did.

Q. Where did you see the bottle before?

A. At Mr. Tony Legatos' bar at 621 K Street, Sacramento.

Q. How do you recognize the bottle?

A. By Mr. Tschierschky's and my initials on one side, and Mr. Theodoratus' initials on the other side of the bottle seal. [22]

Mr. Seawell: I will offer this as Government's Exhibit next in order for identification.

(The bottle of whiskey referred to was marked Government's Exhibit 3 for identification.)

Mr. Seawell: Q. Did you seize another bottle at that time?

(The witness produces a bottle of whiskey.)

Q. You have handed me another bottle of Schenley's whiskey with the number 149421 on it?

A. Yes.

Q. Do you recognize this bottle? A. Yes.

Q. Where did you see the bottle the first time?

A. At the same establishment.

Q. Tony Legatos' bar?

A. Tony Legatos' bar at 621 K Street, Sacramento.

Q. How do you recognize the bottle?

A. By Mr. Tschierschky's and my initials on one side, and Mr. Theodoratus' on the other side.

Mr. Seawell: I will offer this bottle of Schen-

(Testimony of Leonard D. Sanderson.)

ley's Reserve Black Label Whiskey as Government's Exhibit next in order for identification.

(The bottle referred to was marked Government's Exhibit number 4 for identification.)

Mr. Seawell: Q. Did you seize another bottle?

A. Yes, sir.

Q. You have handed me a bottle of Schenley Reserve whiskey [23] with the number 149422. Do you recognize this bottle? A. I do.

Q. Where did you first see it?

A. In the back bar of Tony Legato's establishment at 621 K Street, Sacramento.

Q. How do you recognize that bottle?

A. By Mr. Tschierscky's and my initials on one side and Mr. Theodoratus' on the other side—his name on the other side.

Mr. Seawell: At this time I offer the bottle of Schenley's Reserve Whiskey identified by the witness as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit Number 5 for identification.)

Mr. Seawell: Q. Did you seize another bottle of whiskey at the same time? A. Yes, sir.

Q. Will you hand it to me?

(The witness produces a bottle.)

Q. You have handed me a bottle of Schenley Reserve Whiskey, number 149423. Do you recognize that bottle? A. Yes, sir.

Q. Where did you see it first?

(Testimony of Leonard D. Sanderson.)

A. In the back bar of Tony Legatos' establishment at 621 K Street, Sacramento.

Q. How do you recognize that bottle?

A. By Inspector Tschierschky's and my initials on one side, and Mr. Theodoratus' initials on the other side.

Mr. Seawell: At this time I offer the bottle as [24] Government's Exhibit for identification next in order.

(The bottle referred to was marked U. S. Exhibit Number 6 for identification.)

Mr. Seawell: Q. Did you seize another bottle?

A. Yes, sir. (Producing)

Q. You have handed me a bottle of Schenley Reserve Whiskey, number 149418. Do you recognize this bottle? A. I do.

Q. How do you recognize that bottle?

A. By Inspector Tschierschky's and my initials on one side and Mr. Theodoratus' on the other.

Q. Where did you see this bottle first?

A. At the back bar of Mr. Legatos' establishment, 621 K Street, Sacramento.

Mr. Seawell: At this time I will offer that for identification as Government's exhibit next in order.

(The bottle referred to was marked U. S. Exhibit Number 7 for identification.)

Mr. Seawell: Q. Did you seize another bottle?
(The witness produces a bottle.)

Q. You have handed me another bottle of Schen-

(Testimony of Leonard D. Sanderson.)

ley's Reserve Whiskey, number 149419. Where did you see this bottle?

A. In Tony Legatos' establishment at 621 K Street, Sacramento, California.

Q. How do you recognize the bottle?

A. Mr. Tschierschky's and my initials on one side, and Mr. [25] Theodoratus' initials on the other side.

Mr. Seawell: At this time I will offer the bottle of Schenley's Reserve Whiskey identified by the witness for identification as Government's Exhibit next in order.

(The bottle referred to was marked U. S. Exhibit Number 8 for identification.)

Mr. Seawell: Q. Did you seize another bottle?
(The witness produces a bottle.)

Q. You have handed me another bottle of Schenley Reserve Whiskey, number 149420. Do you recognize that bottle? A. I do.

Q. How do you recognize it?

A. By my initials on one side and Mr. Theodoratus' on the other. This was taken from the back bar of Mr. Tony Legatos' establishment at 621 K Street, Sacramento.

Mr. Seawell: At this time I will offer the bottle of Schenley's Reserve Whiskey identified by the witness as Government's exhibit next in order.

(The bottle referred to was marked U. S. Exhibit number 9 for identification.)

Mr. Seawell: Q. Did you seize another bottle?

(Testimony of Leonard D. Sanderson.)

(The witness produces a bottle.)

Q. You have handed me another bottle of Schenley's Whiskey with the number 149415. I ask you if you recognize that bottle? A. I do. [26]

Q. Where did you see it before?

A. At the back bar of Mr. Tony Legatos' establishment at 621 K Street, Sacramento, California.

Q. How do you recognize that bottle?

A. By Inspector Tschierschky's and my initials on one side and Mr. Theodoratus' on the other side.

Mr. Seawell: At this time I will offer the bottle of Schenley's Reserve Whiskey identified by the witness as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 10 for identification.)

Mr. Seawell: Q. Did you seize another bottle?

A. Yes.

Q. Will you hand me that bottle?

(Witness produces a bottle.)

Q. Where did you first see that bottle?

A. In the back bar of Mr. Tony Legatos' bar at 621 K Street.

Q. You have handed me a bottle of Schenley's Reserve Whiskey, number 149416?

A. Yes, sir.

Q. How do you recognize that bottle?

A. Mr. Theodoratus' initials on one side and Mr. Tschierschky's and mine on the other side.

(Testimony of Leonard D. Sanderson.)

Q. When were the initials put on this bottle, by the way?

A. At the conclusion of the Williams test set.

Mr. Seawell: At this time, may it please the Court, I [27] introduce the bottle of Schenley's Reserve Whiskey identified by the witness as Government's Exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 11 for identification.)

Mr. Seawell: Q. Did you seize another bottle?

(The witness produces a bottle.)

Q. You have handed me a bottle of Schenley's Reserve Whiskey, number 149417? A. Yes.

Q. Where did you seize this bottle?

A. In the back bar of Tony Legatos' establishment at 621 K Street, Sacramento.

Q. How do you identify that bottle of whiskey?

A. Mr. Tschiersky's and my initials on one side, and Mr. Theodoratus' on the other side of the bottle seal.

Mr. Seawell: I will offer this bottle as Government's Exhibit next in order.

(The bottle referred to was marked U. S. Exhibit number 12 for identification.)

Mr. Seawell: Q. I will show you this box and ask you if you recognize that box?

A. I do.

Q. How do you recognize it?

A. By Dr. Love's initials on the top of the seal, with the date.

(Testimony of Leonard D. Sanderson.)

Q. Were those put on in your presence?

A. And sealed in my presence, yes.

Q. Will you look in that case? I will ask you if you seized [28] any of those bottles from Mr. Legatos' premises?

A. Yes, sir.

Q. Will you hand me the ones you seized?

(The witness produces a bottle.)

Q. You have handed me a bottle of Old Hermitage Brand Kentucky straight bourbon whiskey, 93 proof; "This whiskey is four years old," number 149440. I will ask you where you seized that bottle?

A. In the back bar of Mr. Tony Legatos' establishment at 621 K Street, Sacramento.

Q. How do you recognize the bottle?

A. Mr. Tschierschky's and my initials on one side, and Mr. Theodoratus' on the other side.

Mr. Seawell: I will offer this bottle of Old Hermitage brand straight whiskey as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 13 for identification.)

Mr. Seawell: Q. Did you seize another bottle?

A. Yes. (Producing)

Q. You have handed me a bottle of Old Forrester bottled in bond whiskey, Kentucky straight bourbon whiskey, 100 proof. I will ask you if you have seen that bottle before?

A. Yes, sir.

Q. Where did you see that bottle?

A. In the back bar of Mr. Tony Legatos' establishment, 621 K Street, Sacramento. [29]

(Testimony of Leonard D. Sanderson.)

Q. How do you identify that bottle?

A. Mr. Tschierschky's and my initials on one side and Mr. Theodoratus' on the other side.

Mr. Seawell: I will now offer that bottle as Government's Exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 14 for identification.)

Mr. Seawell: Q. Did you seize another bottle?

A. Yes, sir. (Producing)

Q. You have handed me a bottle of Old Hermitage brand Kentucky straight whiskey, number 149441. I will ask you where you seized this bottle?

A. In the back bar of Tony Legatos' establishment, 621 K Street, Sacramento.

Q. How do you identify the bottle?

A. Mr. Tschierschky's and my initials on one side of the bottle seal, and Mr. Theodoratus' on the other.

Mr. Seawell: I will now offer this bottle as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 15 for identification.)

Mr. Seawell: Q. Did you seize another bottle?

A. Yes, sir. (Producing)

Q. You have handed me a bottle of Seagram's V.O. Canadian whiskey, a blend of rare selected whiskies, 86.8 proof, number 149442. I will ask you where you seized this bottle? [30]

(Testimony of Leonard D. Sanderson.)

A. At the back bar of Mr. Tony Legatos' bar at 621 K Street, Sacramento.

Q. How do you identify that bottle?

A. By Mr. Theodoratus' initials on one side and a part of the stamp has been taken off and my initials put on the other side.

Q. The stamp was put on, and you recognize that as the stamp that was put on at the time you seized this bottle on the 18th of July, 1945?

A. Yes, sir.

Mr. Seawell: I will offer this bottle as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 16 for identification.)

Mr. Seawell: Q. Did you seize any other bottle?
(The witness produces a bottle.)

Q. You have handed me a bottle of Johnnie Walker Black Label blended scotch whiskey, distilled in Scotland, bottled in the United Kingdom under Government supervision, and there is a number on it rubbed off to some extent, however the number "44" has been put on it, and I will ask you if you recognize that bottle? A. Yes, sir.

Q. How do you identify that bottle?

A. By Mr. Tschierschky's initials on one side of the bottle seal and Mr. Theodoratus' on the other side.

Q. Where did you seize this bottle? [31]

A. Mr. Tony Legatos' establishment, 621 K Street, Sacramento.

(Testimony of Leonard D. Sanderson.)

Mr. Seawell: At this time I offer the bottle identified by the witness as Government's Exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 17 for identification.)

Mr. Seawell: Q. Did you seize another bottle at the same time?

A. Yes, sir. (Producing)

Q. You have handed me a bottle of Seagram's V.O. Canadian whiskey, a blend of rare selected whiskies, 86.8 proof, and I will ask you if you have seen that bottle before?

A. Yes, sir.

Q. Number 149443. Where did you seize it?

A. At Tony Legatos' establishment at 621 K Street, Sacramento.

Q. How do you identify it?

A. By the bottle seal. Mr. Theodoratus' initials on one side of the bottle seal and the other side has been torn off.

Mr. Seawell: At this time I offer the bottle of Seagram's V.O. Canadian whiskey as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 18 for identification.)

Mr. Seawell: Q. Did you seize another bottle?

A. Yes, sir. (Produces bottle)

Q. Where did you seize this bottle of Johnny Walker Black [32] Label whiskey, number 149445?

A. At Tony Legatos' establishment at 621 K Street, at the back bar.

(Testimony of Leonard D. Sanderson.)

Q. How do you identify that bottle?

A. By Mr. Tschierschky's initials on one side and the remaining part of the seal has been torn off.

Q. All these bottles from Government's exhibit 1 to —

The Clerk: That will be 19.

Mr. Seawell: At this time I will offer this as Government's Exhibit number 19.

(The bottle referred to was marked U. S. Exhibit number 19 for identification.)

Mr. Seawell: Q. (Continuing) —were all seized on what day?

A. July 18, 1945.

Q. At the time in question when you went in and made your inspection, is that correct?

A. Correct.

Q. Now I will show you this carton and ask you if you recognize that carton? A. I do.

Q. How do you recognize that carton?

A. By Dr. Love's signature and the date. It was sealed in my presence.

Q. I will ask you to identify the bottles in that case.

(The witness produces a bottle.)

Q. You have handed me a bottle of Old Charter, number 149436. This purports to be Kentucky straight bourbon, 90 proof, "This whiskey is six years old." I will ask you where you first saw that bottle?

A. Tony Legatos' establishment [33] at 621 K Street, Sacramento.

(Testimony of Leonard D. Sanderson.)

Q. How do you identify that bottle of whiskey?

A. The strip stamp has been removed in this, but it is right in line—I remember the soiled strip stamp and the label.

Q. Did you put these numbers on there?

A. No, they were put on in the chemist's office in San Francisco.

Q. By the way, you delivered all these bottles after you seized them to the chemist?

A. Personally to the chemist.

Q. What chemist?

A. Mr. R. F. Love, the chemist in charge, 100 McAllister Street, San Francisco.

Mr. Seawell: I will offer that bottle as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 20 for identification.)

Mr. Seawell: Did you seize any other bottles?

(The witness produces a bottle.)

Q. You have handed me a bottle of Old Charter Kentucky bourbon whiskey, number 149437. I will ask you where you first saw that bottle?

A. At Tony Legatos' establishment, 621 K Street, Sacramento.

Q. How do you identify that bottle?

A. By Mr. Tschierschky's initials on one side and the main part of the label has been destroyed.

Q. Did you seize this at Tony Legatos' place of business—

A. Yes, sir.

Q. —at the same time you seized the others?

(Testimony of Leonard D. Sanderson.)

A. Yes.

Mr. Seawell: I will offer this bottle of Old Charter Kentucky straight whiskey as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 21 for identification.)

Mr. Seawell: Q. Did you seize any other bottles?

A. Yes, sir. (Producing)

Q. You have handed me a bottle that purports to be bottled in bond Old Forrester whiskey, 100 proof, number 149438. Have you seen that bottle before?

A. Yes, sir.

Q. Whereabouts?

A. At Tony Legatos' establishment, 621 K Street, Sacramento.

Q. How do you identify that bottle?

A. By Mr. Tschierschky's and my initials on one side and Mr. Theodoratus' on the other side of the bottle seal.

Mr. Seawell: I offer this bottle of Old Forrester Kentucky straight bourbon whiskey as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 22 for identification.)

Mr. Seawell: Q. Did you seize another bottle?

A. Yes, sir. (Producing) [35]

Q. A bottle of Seagram's Seven Crown Blended Whiskey, 86.8 proof. I will ask you where you saw that bottle. The number is 149433.

(Testimony of Leonard D. Sanderson.)

A. At the back bar of Tony Legatos' establishment at 621 K Street, Sacramento.

Q. How do you identify it?

A. By Mr. Tschierschky's and my initials on one side and Mr. Theodoratus' initials on the other side of the bottle seal.

Mr. Seawell: I will offer this bottle of Seagram's Seven Crown blended whiskey as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 23 for identification.)

Mr. Seawell: Q. Did you seize another bottle at that time and place?

(The witness produces a bottle.)

Q. You have handed me a bottle of Lord Calvert blended whiskey, number 149434, being the number on it, it states it is blended whiskey, 86.8 proof. I will ask you if you have seen that bottle before?

A. I have.

Q. Whereabouts?

A. At the back bar of Tony Legatos' establishment at 621 K Street, Sacramento.

Q. How do you identify that bottle?

A. By Mr. Tschierschky's and my initials—and Mr. Theodoratus' initials on one side of the bottle seal. The other part has been torn off. [36]

Q. Did you seize this bottle at the time and place?

Mr. Seawell: I will offer that bottle as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit 24 for identification.)

(Testimony of Leonard D. Sanderson.)

(The witness produces another bottle.)

Mr. Seawell: Q. You have handed me another bottle of Lord Calvert, number 149435, blended whiskey, 86.8 proof. I will ask you if you recognize that bottle?

A. Yes, sir.

Q. Where did you see that bottle first?

A. At Mr. Tony Legatos' establishment, 621 K Street, Sacramento.

Q. And how do you identify that bottle?

A. By Mr. Tschierschky's initials on one side and Mr. Theodoratus' initials on the other side of the bottle seal.

Q. You seized this bottle at the same time and place, is that correct? A. Yes.

Mr. Seawell: I will offer that bottle as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S.

Exhibit number 25 for identification.)

Mr. Seawell: Q. Did you seize another bottle of Seagram's Seven Crown that you have handed me, number 149432?

A. Yes, sir.

Q. Did you seize that bottle? A. Yes.

Q. Where did you seize that bottle?

A. At Mr. Tony [37] Legatos' establishment, 621 K Street, Sacramento, California.

Q. How do you recognize that bottle?

A. By Mr. Tschierschky's initials on one side of the bottle seal and Mr. Theodoratus' on the other side.

(Testimony of Leonard D. Sanderson.)

Mr. Seawell: I offer that bottle of Seagram's 7-Crown Blended Whiskey, 86.8 proof, as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 26 for identification.)

Mr. Seawell: Did you seize another bottle?

A. Yes, sir. (Producing)

Q. You have handed me a bottle of Four Roses, purporting to be a blend of straight whiskies, blended by the Frankfort Distilleries, Incorporated, Frankfort, Kentucky, purports to be 90 proof. I ask you where you saw that bottle first?

A. In the back bar of Tony Legatos' establishment at 621 K Street, Sacramento, California.

Q. How do you identify that bottle?

A. By Mr. Tschierschky's and my initials on one side of the bottle seal and Mr. Theodoratus' on the other.

Mr. Seawell: I will offer that bottle as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 27 for identification.)

Mr. Seawell: Q. Did you seize another bottle?

A. Yes, sir. (Producing)

Q. You have handed me another bottle of Four Roses, number 149430, purporting to be a blend of straight whiskies. Where did you see that bottle before?

A. In Mr. Tony Legatos' establishment at 621 K Street.

(Testimony of Leonard D. Sanderson.)

Q. How do you recognize that bottle?

A. Mr. Tschierschky's initials on one side of the seal and Mr. Theodoratus' on the other side.

Q. You seized that at the same time and place?

A. Yes.

Mr. Seawell: I offer that as next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 28 for identification.)

Mr. Seawell: Q. Did you seize another bottle?

A. Yes, sir. (Producing)

Q. You have handed me a bottle with the label mutilated, however, it appears "Schenley's Reserve"—

A. Black Label.

Q. Can you tell me what kind of whiskey that is?

A. Schenley Black Label whiskey, 86 proof, blended whiskey.

Q. How do you recognize that bottle?

A. Mr. Tschierschky's initials on one side of the seal and Mr. Theodoratus' on the other side.

Q. Did you seize that at the same time and place? [39]

Mr. Seawell: I will offer that bottle of whiskey as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 29 for identification.)

(The witness produces another bottle of whiskey.)

Mr. Seawell: Q. You have handed me another

(Testimony of Leonard D. Sanderson.)

bottle of whiskey that purports to be Schenley's Reserve whiskey, bottled in—bottled by Schenley Distillery, the proof is scraped off——

A. 86 proof.

Q. It is 86 proof—supposed to be 86.8, is that it?

A. No, 86 proof.

Q. And do you recognize that bottle?

A. I do.

Q. Where did you see that?

A. Mr. Tony Legatos' establishment, 621 K Street, Sacramento.

Q. How do you identify that bottle of whiskey?

A. Mr. Tschierschky's and my initials on one side, and Mr. Theodoratus' on the other side of the seal.

Mr. Seawell: I will offer this as Government's exhibit next in order for identification.

(The bottle referred to was marked U. S. Exhibit number 30 for identification.)

(The witness produces another bottle of whiskey.)

Mr. Seawell: Q. You have handed me a bottle of Four Roses, number 149429, which purports to be a blend of straight whiskies, 90 proof. I will ask you if you have [40] seen that before?

A. I have.

Q. Where did you first see it?

A. In the back bar of Mr. Tony Legatos' establishment, 621 K Street, Sacramento.

Q. How do you identify that bottle?

(Testimony of Leonard D. Sanderson.)

A. Mr. Tschierschky's and my initials on one side of the bottle, and Mr. Theodoratus' on the other side.

Mr. Seawell: At this time I will offer this bottle for identification as Government's exhibit next in order.

(The bottle referred to was marked U. S. Exhibit number 31 for identification.)

Mr. Seawell: Is that all?

A. That is all.

Q. That is all that you seized?

Mr. Kennedy: Mr. Seawell, they are all offered for identification?

Mr. Seawell: Yes. I meant to state that, if I didn't.

Q. Now these thirty-one bottles you have testified, I believe, were all seized on the 18th day of July at Tony Legatos' premises?

A. That is right.

Q. Now you had a conversation with the bartender after you had seized these bottles at that time in regard to coming back again?

A. Approximately 10:20 Mr. Theodoratus came to the establishment and went downstairs to the basement in the small office——

Q. And who was he, if you know?

A. He was the manager of the establishment.

Mr. Kennedy: Pardon me. Objected to as calling for a conclusion and opinion of the witness.

Mr. Seawell: Q. Did you have a conversation with him?

(Testimony of Leonard D. Sanderson.)

A. I did.

Q. What did you say to him and what did he say to you?

Mr. Kennedy: Objected to as hearsay.

Mr. Brannely: Objected to as hearsay.

Mr. Seawell: All right, I will withdraw the question.

Q. Anyhow, Mr. Theodoratus came in the place. Then what did you do? Just tell us the next thing you did.

A. I went downstairs to have a talk with Mr. Theodoratus in regards to his knowledge of these bottles having been refilled.

Q. And then what did you do? The next thing that you did after that?

A. Do you want me to say what he told me?

Q. No, no, just say what you did. Did you make any appointment to come back again?

A. Mr. Tschierschky and I made an appointment to have Mr. Maritsas on the premises the next morning, or at any time at his convenience, and he suggested 12:00 o'clock, July 19th, the very next day.

Q. And then did you leave the premises after making that appointment?

A. The bottles were sealed and Mr. Theodoratus signed his name on the seals, and we gave him a copy of the removal of [42] bottled spirits, which is a receipt for the bottles which we had removed, and the bottles were placed into three cartons, and we left the premises.

(Testimony of Leonard D. Sanderson.)

Q. What did you do with the bottles after you left the premises?

A. The bottles were locked up in the back of the car and I kept the key to the back of the car in my pocket at all times.

Q. Then what did you do with them?

A. These bottles were taken to the Bureau chemist in San Francisco, 100 McAllister Street.

Q. And who was that?

A. Mr. R. F. Love.

Q. They were never out of your possession?

A. No, sir.

Q. You didn't take out or add anything to them after you made your test? A. No, sir.

Q. Now did you go back the next day to these premises? A. We did.

Q. Who was present when you arrived there?

A. Mr. Maritsas and Mr. Legatos.

Q. You are referring to the two defendants on trial in this case? A. Yes, sir.

Q. What time was this?

A. This was 12:00 o'clock.

Q. And who was with you?

A. Mr. Tschierschky.

Q. And did you have a conversation with the defendants in regard to the refilling of these bottles?

A. We did. [43]

Q. And what was said by yourself and what was said by Mr. Maritsas in regard to the refilling of any of these bottles? A. I talked——

Mr. Kennedy: Just a moment, if your Honor

(Testimony of Leonard D. Sanderson.)

please. Objected to on the ground it calls for hearsay testimony——

Mr. Seawell: Calls for what?

Mr. Kennedy: ——and there is no proof of the corpus delicti.

Mr. Seawell: May it please the Court——

Mr. Brannely: Your Honor, I make the same objection on behalf of Mr. Legatos, any statement made by any defendants are not admissible in evidence until the corpus delicti has been established. We base our objection on that ground.

The Court: Overruled.

Mr. Seawell: Will you proceed?

Mr. Kennedy: Further, your Honor, there is no proper foundation.

The Court: Overruled.

Mr. Seawell: Go ahead, Mr. Sanderson.

A. Inspector Tschierschky and I presented our credentials to Mr. Legatos and Mr. Maritsas. We had not met them before. And during the course of the conversation I asked him what——

Q. You asked who?

A. Mr. Maritsas what was in this refilling of bottles, if he had any knowledge of the refilling of bottles. He said, [44] “I do.” He said, “I had 14 bottles of Schenley’s Reserve Black Label blended whiskey, 86 proof.” He said, “I put one-half Ron Manana rum and one-half Schenley’s in these bottles.”

Q. In other words, he said he refilled 14 of these

(Testimony of Leonard D. Sanderson.)

bottles that are in evidence that are correct, these Schenley bottles? A. Yes, sir.

Q. With half rum?

A. Yes, sir. I said, "How about the remaining 17 bottles?" He said, "The bartenders at the close of the day's business have small portions of one brand of spirits and they pour them promiscuously from one brand to another. They don't like to have small portions in the bar. The bar is a busy place and they cater to working men, and they don't like to have small portions of liquor in the bottles to start with."

Q. In other words, he said they would take a bottle of Seagram's 5-Crown, or whatever it might be, and pour it into another bottle with, say, Seagram's 7-Crown, or some other brand?

Mr. Kennedy: Objected to as leading and suggestive.

The Court: Overruled.

Mr. Seawell: Well, that is his testimony.

Q. Isn't that correct, that is your testimony?

A. That is my testimony.

Q. Did you have a conversation with Mr. Legatos? [45] A. Yes, sir, I did. He said——

Q. What did he say?

A. He said he absolutely had no knowledge of this, he had instructed his bartenders and his managers absolutely not to refill any spirit liquor or pour it from one bottle to another, and I asked him if Mr. Maritsas was working on a commission basis, and he said, "No," he was working for a salary.

(Testimony of Leonard D. Sanderson.)

Q. Was there any further conversation, anything else said at this time?

A. I asked Mr. Maritsas if he would sign a statement to the effect that he had refilled these bottles, and he said yes. And I wrote out a statement and Mr. Maritsas signed it in the presence of Mr. Tschierschky, Mr. Legatos and myself.

Q. Have you that statement with you?

A. Yes, sir.

Q. Will you produce it?

(The witness produces statement.)

Q. You have handed me a statement here which bears the signature of Chris Maritsas, and do you recognize that signature? A. Yes, sir, I do.

Q. Was that put on in your presence?

A. Yes, sir.

Q. Who signed that? A. Chris Maritsas.

Q. And at the bottom appears, "Subscribed and sworn to before me this 19th day of July," and there are two signatures. Do you recognize the signatures? A. Yes, sir. [46]

Q. Whose signatures are they?

A. The top signature is my signature and the other signature is Inspector Tschierschky's signature.

Q. Was that put on in your presence?

A. Yes.

Q. Did you make any threats to the defendant in order to get him to sign this statement?

A. Absolutely not.

Q. Did you make him any promises——

(Testimony of Leonard D. Sanderson.)

A. No, sir.

Q. Any promises of immunity or otherwise?

A. No.

Q. Didn't beat him or use any force?

A. No.

Mr. Seawell: At this time, may it please the Court——

Mr. Kennedy: Before the statement is read, your Honor——

Mr. Seawell: Wait a minute. I haven't offered the statement yet. May I offer the statement of Chris Maritsas as Government's Exhibit next in order?

Mr. Kennedy: In reference to the statement, your Honor, we object to it on the same grounds heretofore urged relative to the conversation of Chris Maritsas, that the corpus delicti has not been proven.

The Court: Overruled.

(The document referred to was marked U. S. Exhibit number 32.)

Mr. Seawell: At this time I will read the thing to the jury.

This is dated "Sacramento, California, July 19, 1945. [47]

"I, Chris Maritsas, solemnly swears that the foregoing statement is true; I personally refilled 14 bottles of Schenley's Reserve Blended Whiskey with one-half Ron Manana imported rum, 86 proof. I have been doing this refilling for about ten days myself. The remaining bottles have been refilled by

(Testimony of Leonard D. Sanderson.)

the bartenders pouring from one bottle to another. I was fully aware that this was against the laws of the Bureau of Internal Revenue."

Signed "Chris Maritsas."

"Subscribed and sworn to before me this 19th day of July. L. D. Sanderson, Alex G. Tschierschky."

Mr. Seawell: Q. Did you have any further conversation at that particular time that you recall in regard to this matter that would have any bearing on this case?

A. I don't believe so.

Q. And thereafter do you recall that the defendant, Chris Maritsas, was arraigned before the United States Commissioner? A. Yes, sir.

Q. Were you present? A. No, sir.

Q. You weren't present at that time?

A. No, sir.

Q. At either one of the hearings?

A. No, sir.

Mr. Seawell: That is all. [48]

Cross Examination

Mr. Kennedy: Q. Mr. Sanderson, relative to—what is the number on that exhibit?

The Clerk: Thirty-two.

Mr. Kennedy: Q. (Continuing) —32, whose handwriting is this statement in?

A. That is my handwriting.

Q. It is not in Mr. Maritsas' handwriting at all?

A. No, sir.

Q. And you had another and additional conver-

(Testimony of Leonard D. Sanderson.)

sation with him prior to the time he signed that, did you not?

A. I had additional conversation?

Q. Yes, other than you have testified to on your direct examination? A. Not that I recall.

Q. Wasn't there some conversation by you relative to the fine per bottle?

A. No, sir, absolutely not.

Q. I will ask you if it isn't a fact, Mr. Sanderson, at the time and place in question, immediately prior to Mr. Maritsas affixing the signature, you didn't tell him in substance that upon signing the statement the fine would be \$10 per bottle?

A. I absolutely did not.

Q. Did you say anything—did you make any reference at all—— A. No, sir.

Q. ——to any fine? A. No, sir.

Q. Did you make any reference to any bottles?

A. I had reference to the 31 refilled bottles. No reference [49] to any fine.

Q. Did you ever have a conversation with anyone else? Did you ever have a conversation with Nick Theodoratus?

A. No, sir. I had a conversation with him, yes, sir.

Q. Relative to the amount of fine?

A. No, sir.

Cross Examination

By Mr. Brannely:

Q. Mr. Sanderson, you state that the conversation took place between Mr. Legatos, Mr. Maritsas,

(Testimony of Leonard D. Sanderson.)

yourself and the other officer on the 17th day of July, about noon, is that correct?

Mr. Seawell: Nineteenth.

A. No, sir, the 19th day of July, about noon.

Q. Mr. Brannely: That was the day after you had taken these 31 bottles from the establishment known as the Golden Tavern, is that correct?

A. That is correct.

Q. And I imagine that when you took these 31 bottles from the tavern there and while you were making your various tests in the tavern, that you looked at the revenue stamps very carefully, didn't you?

A. That is right.

Q. And you found that each of the revenue stamps on these 31 bottles had been broken?

A. Naturally, yes.

Q. You did find that to be a fact, did you not?

A. That is right.

Q. And I believe you said something regarding this conversation which took place on the next day at about noon, during [50] which time Mr. Legatos was present?

A. That is right.

Q. And Mr. Maritsas said to you that he had added rum to 14 bottles of Schenley's?

A. That is right.

Q. Is that correct? A. That is correct, sir.

Q. And that he explained to you the manner in which the remainder of the bottles had contents other than their original contents—that is, rum or whatever it might be——

A. Yes.

Q. ——that the other bartenders—the short bot-

(Testimony of Leonard D. Sanderson.)

tles that were almost empty, they would pour into bottles that contained more liquid when the went off duty?

A. That is right, that is what Mr. Maritsas stated.

Q. And Mr. Legatos—of course, you were very much interested in knowing where Mr. Legatos stood in this deal, weren't you, Mr. Sanderson?

A. He was the proprietor of the establishment.

Q. Yes, and you were very much interested in learning what he had to do with this deal?

A. Yes. He was the proprietor of the establishment.

Q. And did I understand you to say that Mr. Legatos said he knew nothing about anything like that going on in his establishment?

A. He told me that he absolutely told his bartenders that he absolutely did not want any tampering with liquor bottles.

Q. No tampering with liquor bottles?

A. Yes, sir. [51]

Q. He stated that to you? A. Yes.

Q. Did he further state to you that the bartenders and everyone in his establishment had instructions not to violate any provisions of the law in respect to the sale of beverages?

A. That is right.

Q. I believe you stated Mr. Legatos was the owner of a number of bars and restaurants and so forth? A. That is right.

Q. And that same day did you go to another one

(Testimony of Leonard D. Sanderson.)

of his establishments known as the New Tony's Cafe, 422 L Street——

Mr. Seawell: Just a moment. I will object as incompetent, irrelevant and immaterial to what happened in any other bar.

Mr. Brannely: May I be heard, your Honor?

The Court: Yes.

Mr. Brannely: The gist of this offense against Mr. Legatos, your Honor, is knowledge and intent on his part to violate the law. Now my question is a preliminary question to bring out this fact: That this very same day other establishments belonging to Mr. Tony Legatos were visited by these agents, and identical tests were made in other establishments owned by him, and there was nothing found in those places which contained any deleterious substance or the addition of any other liquid than the original contents. And I say this, and our position is this, that that is a very important fact for the jury to consider in determining whether there was any intent, and I asked that question, your Honor, to go to the [52] intent of Mr. Legatos, and it is for that purpose and that purpose alone.

Mr. Seawell: May it please the Court, I have no knowledge of whether or not they went to any of these bars, but if they did, there is a telephone service in Sacramento and it would be absurd to expect them to find anything in the other bars. I don't see how that would have any bearing on the guilt or innocence of the defendant what happened in other bars. We are talking about this one bar.

(Testimony of Leonard D. Sanderson.)

The Court: Overruled.

Mr. Brannely: You may answer.

The Witness: What was the question?

Q. Did you go to another premise in Sacramento owned by Mr. Legatos known as the New Tony's Cafe? A. We did.

Q. Did you make your tests there?

A. Yes.

Q. Did you find anything wrong there?

A. Well, it was late that afternoon when we went there, and there was plenty of time between—

Q. Just a moment. Answer the question.

A. No, we found nothing wrong there.

Mr. Seawell: Now, let him explain.

The Court: Yes.

Mr. Brannely: Q. Your answer is you found nothing wrong there.

Mr. Seawell: Now you may explain your answer if you [53] desire.

Mr. Brannely: No, your Honor, that is not a yes or no answer. The answer explains itself. Anything that this witness would testify to in addition to what he has already stated would be not responsive to the question, and further it would be merely his opinion and conclusion, and I object to any further voluntary statement on the part of this witness.

Q. Now, Mr. Sanderson, who was this Nick Theodoratus you have been mentioning in the testimony here frequently?

A. He is Mr. Legatos' manager.

Q. Of the Golden Tavern?

(Testimony of Leonard D. Sanderson.)

A. Right, so he stated.

Q. At 621 K Street in the City of Sacramento?

A. That is correct.

Q. Have you subpoenaed him or produced him as a witness in this case?

Mr. Seawell: Just a minute. I object to that as incompetent, irrelevant and immaterial as to who we subpoenaed as a witness. He works for Mr. Legatos. I should think you could find him.

Q. Mr. Brannely: Let me ask you this: Do you know where Mr. Theodoratus is at the present time?

Mr. Seawell: I object to that as incompetent, irrelevant and immaterial so far as this case is concerned.

The Court: Sustained. [54]

Mr. Brannely: I think that is all.

Redirect Examination

Mr. Seawell: Q. Now you stated you went to the place owned by Tony Legatos at 621 K Street at 10:00 in the morning, about 10:00 a.m. on the 18th day of July, 1945, is that correct? A. Yes.

Q. And did you do other work in Sacramento after that? A. Yes, sir.

Q. And you said you went to another place owned by Tony Legatos at what time?

A. It was late, very late in the afternoon. I imagine 4:00 or 4:30 in the afternoon.

Q. And between that time and the time you went to Tony's did you work at other places?

(Testimony of Leonard D. Sanderson.)

A. Yes, sir.

Q. How many?

A. There was Mr. Legatos' place and four others, and then Mr. Legatos' place on L Street, four hundred twenty something L Street. Six places.

Q. And you had been to a lot of bars in between? A. Six that one afternoon.

Mr. Seawell: That is all:

Recross Examination

Mr. Brannely: Q. Mr. Sanderson, I believe you stated in your testimony there that at the time on July 18th that you made the seizure of these 41 bottles, Mr. Legatos was not present?

A. He was not.

Q. Did you make inquiries at that time regarding the [55] whereabouts of where Mr. Legatos was at that time?

A. When Mr. Theodoratus came in we asked Mr. Theodoratus if we could contact Mr. Legatos, and he said, "I don't believe you can, I have no idea where he is."

Q. In other words, you made no inquiry to ascertain whether Mr. Legatos was in Sacramento or out of Sacramento, is that correct?

A. We didn't know.

Q. You didn't know. So far as you know, Mr. Legatos had no knowledge of the seizure here until the next day when you saw him at noon?

A. I believe he knew about it very shortly——

(Testimony of Leonard D. Sanderson.)

Q. Just a moment, I am not asking you what you believe, I am asking you what you know.

A. I don't know.

Q. You don't know.

Mr. Brannely: That is all.

Mr. Seawell: That is all. Thank you.

ALEX TSCHIERSCHKY,

called for the Government, sworn.

Direct Examination

Mr. Seawell: Q. What was your occupation on or about the 17th, 18th and 19th days of July, 1945?

A. I was an Inspector in the Alcohol Tax Unit of the Internal Revenue Department.

Q. Since then you have resigned, is that correct?

A. Yes, sir.

Q. When was that about?

A. I believe in August, August 15th.

Q. Of 1945? A. Yes.

Q. Now on or about the 18th day of July, 1945, did you accompany Mr. Sanderson, the other agent who has testified, to Sacramento? A. I did.

Q. And when you came to Sacramento did you accompany him to various bars around and about Sacramento and make certain tests?

A. That is right.

Q. And among other bars did you go to one located at 621 K Street, known as the Golden Tavern?

(Testimony of Alex Tschierschky.)

A. We did.

Q. And what time did you go to that bar?

A. Well, I think that was around noon, around 12:00 o'clock.

Q. You went there——

A. No, it was early in the morning, right after they opened up. About—oh, I would say 10:20, 10:30.

Q. You went twice to this bar, once on the 18th and once on the 19th, is that correct?

A. That is right.

Q. And the first day you went to the bar who accompanied you there? A. Mr. Sanderson.

Q. And was the bar open when you got there?

A. Yes.

Q. Was anybody in it, customers?

A. There was a few customers at the bar. [57]

Q. Was a bartender present?

A. Yes, sir.

Q. And what happened after you went into the bar?

A. Well, when we presented our credentials and identified ourselves to a man by the name of O'Leary and told him what the purpose of our being there—what the purpose of our visit was, we went behind the counter, or the bar, and took out some bottles for the purpose of testing.

Q. How many bottles did you take out?

A. Approximately 40.

Q. You say you tested them. What do you refer to as testing bottles?

(Testimony of Alex Tschierschky.)

A. Well, by using the Williams Test.

Q. And what does that test determine? Why did you test the bottles?

A. That tests the——

Mr. Kennedy: Objected to as calling for a conclusion of the witness.

Mr. Seawell: Q. Did you go to this school to study the Williams Test? A. I did.

Q. How long did you go to school?

A. About six weeks.

Q. And who conducted the school?

A. Well, a man by the name of—I can't think of his name.

Q. Anyway, it was conducted under the supervision of the United States Government, is that correct? A. Yes.

Q. And you learned how to conduct these tests at that school?

Mr. Kennedy: Objected to as leading and suggestive.

Mr. Seawell: I am qualifying him—— [58]

Mr. Kennedy: You can do it without leading questions.

Mr. Seawell: All right.

Q. What did you do at the school?

A. Well, they taught us the purpose of the test, the reason for the separation of alcohol from other substances and what it determined.

Q. Well, any how, you did take out these 40 bottles from behind the bar, is that correct?

A. That is right.

(Testimony of Alex Tschierschky.)

Q. And then what did you do with them?

A. We tested them and those that we found that were irregular, we set them aside and then sealed them later and confiscated them.

Q. Will you come down and take a look at these bottles—you have to look at each and every one—your signature appears, I believe, on all of them—will you identify each bottle? We start here with number 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17—18; will you take a look at those 18 bottles and see if your signature appears on each and every one?

A. Yes. The strip seal here is not completed.

Q. Speak loud so the jury can hear you.

A. The strip seal here is not completed.

Q. Well, on all the bottle from 1 to 17, which are now upon the desk, your signature appears upon them? A. Yes. [59]

Q. And when did you put your signature on the bottles? A. It was on July 18th.

Q. Now will you take a look—may I have him hake a look at the remaining bottles? That is the easiest way to do it. Does your signature appear upon those?

A. All but this one here (indicating).

Q. All but this one here. Now you state that your signature appears upon each and every bottle with the exception of two that we have removed, is that correct? A. Yes.

Q. Now I will show you Government's exhibit 18

(Testimony of Alex Tschierschky.)

for identification and ask you if you recognize that bottle? A. Yes, I believe I do.

Q. And how do you identify that bottle?

A. Well, by this top on it. I know there were several like that.

Q. Will you speak loud enough for the jury to hear you?

A. By this top, this type of top that has been adjusted to hold the label on—strip stamp on.

Q. The strip stamp was put on the bottles at that time? A. Yes.

Q. I will hand you this bottle of Old Charter and ask you if you can recognize that, Exhibit 20.

A. No, I can't.

Q. You can't recognize that. You weren't present when the number was put on? A. No.

Q. At any event, all the bottles, with the exception of Government's Exhibit 20, you recognize, is that correct? A. Yes.

Q. And where did you see all these bottles, Government's Exhibit 1 to 31? With the exception of Exhibit 20.

A. At the premises of 618 K Street, known as the Golden Tavern.

Q. When? A. That was on July 18th.

Q. 1945? A. 1945.

Q. And do you know what was done with those bottles after they were inspected by you and the other inspector?

A. Yes. We put them in a carton after sealing them and put them in our car and locked the car.

(Testimony of Alex Tschierschky.)

Q. And then they were in the custody of either you or the other inspector, which?

A. Yes, Mr. Sanderson.

Q. Mr. Sanderson had custody from then on. Now were you present when a conversation took place between the bartender O'Leary—I will withdraw that question. At any event, after you had sealed these bottles, you removed them to the car, is that correct? A. Yes.

Q. And did you make an appointment to return the next day with anyone?

A. Yes, we were to meet around 12:00 o'clock, and I think Mr. Maritsas was to be there.

Q. And then did you leave the premises that day? A. On July 19th? [61]

Q. July 18th now. A. July 18th? Yes.

Q. And then did you come back the next day?

A. That is right.

Q. And what time did you come back?

A. I think it was after 12:00 o'clock.

Q. 12:00 noon, is that correct?

A. Yes, sir.

Q. And who was present when you returned?

A. Mr. Maritsas and Mr. Legatos.

Q. And were you present?

A. And Mr. Sanderson and myself.

Q. And Mr. Sanderson. Then there was a conversation had between you, Mr. Sanderson, Mr. Maritsas and Mr. Legatos in regard to the refilling of some bottles which you had seized the day previous, July 18, 1945? A. Yes, sir.

(Testimony of Alex Tschierschky.)

Q. Do you recall what was said by Mr. Maritsas and Mr. Legatos in that regard?

A. Well, we asked him if he knew——

Q. Asked who?

A. Mr. Maritsas if he knew how this happened, and he told us that he had filled 14 bottles himself and that the rest of the bottles——

Q. Did he state what he had filled them with?

A. He said the Schenley 86 proof with equal parts of Ron Manana rum and Schenley whiskey.

Q. Did he tell you how the remaining bottles became filled? [62]

A. Yes, sir. He said that his bartenders filled them from partially filled bottles and they were emptied into different bottles and mixed.

Q. In other words, they took different brands of whiskey and mixed them to fill one bottle, is that correct?

A. That is right.

Q. Did you hear what Mr. Legatos had to say in regard to his part in the transaction?

A. Yes. Mr. Legatos stated that he told his boys not to—he told that to Mr. Maritsas, I believe, at the time—it was directed to him, that they weren't to fill any bottles.

Q. In other words, he denied having any part in the whole transaction?

A. That is right.

Mr. Seawall: That is all.

Cross Examination

Mr. Kennedy: Q. Mr. Tschierschky, your conversation with Mr. Maritsas and Mr. Legatos was

(Testimony of Alex Tschierschky.)

the same conversation which Mr. Sanderson, your associate, testified? A. That is right.

Q. In other words, all four of you were present?

A. That is right.

Q. It was sometime around noon on July 17th?

A. Yes.

Q. Sometime around there? A. Yes.

Q. Now going to the conversation of Mr. Maritsas relative to the 14 bottles, he stated, you said, that he had filled all [63] of those?

A. Yes, himself.

Q. Put rum in there. Now can you remember his exact words, please, with reference to the other bottles?

A. That is pretty hard for me to remember now. I have not been in the service for nine months and I haven't paid much attention to it.

Q. Was his statement that he had nothing to do with these bottles, that the other bartenders might have? A. Well, I am not positive.

Q. Would you say that that was not true? In other words, his actual statement was that he knew nothing about that at all, that the other bartenders might have put some kind of spirits from one bottle into another?

A. I believe he said it was done.

Q. Well, this is true, as a matter of fact: Practically every place at the end of the day they will sometimes take the residue in one bottle where there are three or four of the same brand and put it in another, isn't that true?

(Testimony of Alex Tschierschky.)

Mr. Seawall: Just a moment. That is assuming everybody is a law violator. It is against the law to pour one bottle into another, and I don't believe every place does it every day.

Mr. Kennedy: I don't believe it is against the law——

The Court: Proceed.

Mr. Kennedy: Q. Then your best recollection of the conversation at the present time is that you might have said [64] that, that it was the other bartenders? A. Yes.

Q. But he did deny specifically having any knowledge at all of anything other than the bottles labeled Schenley's, isn't that true?

A. The fourteen bottles, yes.

Q. And he denied having anything to do with the remainder of the bottles? A. Yes.

Mr. Kennedy: That is all.

Mr. Seawall: Just one more question.

Mr. Brannely: Just a moment. I haven't cross examined him yet. That is the orderly procedure, isn't it?

Cross Examination

By Mr. Brannely:

Mr. Brannely: Q. Mr. Tschierschky, is that the way you pronounce your name? A. Yes.

Q. You and Mr. Sanderson, when you went down there, I imagine were pretty much interested in the stamps on the bottles? A. Yes.

Q. As you were both members of the Alcoholic Tax Unit? A. Yes.

(Testimony of Alex Tschierschky.)

Q. And it was your duty to see whether the stamps were broken or remained intact on the bottles?

Mr. Seawall: I will stipulate the stamps were on them.

Mr. Brannely: Q. You found that each stamp on the thirty-one bottles here individually had been broken, did you not? A. Yes.

Q. Now you were present at the time a statement was written [65] out by Mr. Sanderson and signed by Mr. Maritsas. In that statement you remember that he admitted that he had placed Ron Manana imported rum, I think, in with the contents of 14 Schenley's blended whiskey bottles?

A. Yes.

Q. That was the contents of it? A. Yes.

Q. And, of course, before Mr. Sanderson wrote that he had a discussion with Mr. Maritsas, didn't he? A. Yes.

Q. And the discussion, I imagine, was along the lines of what he wrote down, is that correct?

Mr. Seawall: Of course, this is outside the direct examination.

Mr. Brannely: What do you mean it is outside the direct examination?

Mr. Seawell: I was trying to identify these so you could go into that, but you objected to it.

Mr. Brannely: He has testified he was present when it was signed, and it is already in evidence——

Mr. Seawell: It is outside the direct examination, but you may proceed.

(Testimony of Alex Tschierschky.)

Mr. Brannely: Mr. Tschierschky, was Mr. Legatos present at the time that statement was signed?

A. I believe he was.

Q. Well, now, do you know if he was not? That is what we are interested in.

A. Well, I would say yes. [66]

Q. You would say yes? A. Yes.

Q. And was Mr. Theodoratus, this gentleman whose name has been so prominently mentioned, was he present?

A. I don't think so, I don't remember.

Q. Was he on the premises, if you know?

A. He was there the day before. He may have come in and may not have. I am not positive.

Q. Did you find out what his duties were at the Golden Tavern?

Mr. Seawell: Who is this?

Mr. Brannely: Nick Theodoratus.

A. I understood he was manager there.

Q. You understood he was the manager there.

Now you also were present at the time this conversation was had in which Mr. Legatos stated that he had absolutely no knowledge that anything like that was being done? You were there, weren't you? And I imagine your testimony concurs with that of Mr. Sanderson in that he explicitly instructed his bartenders to follow every provision of the Alcohol Tax Unit regulations.

Mr. Seawell: That wasn't the testimony.

Mr. Brannely: If you have an objection——

(Testimony of Alex Tschierschky.)

Mr. Seawell: Yes, I have an objection to the form of the question.

The Court: Proceed.

Mr. Brannely: Q. Mr. Tschierschky, were you present with Mr. Sanderson when the inspection of the premises at 422 [67] L, New Tony's Cafe, was made? A. Yes.

Q. You were there too. And I imagine your testimony agrees with Mr. Sanderson's that you found nothing wrong with the bottles on the premises there? A. That is right.

Mr. Brannely: That is correct. That is all.

Redirect Examination

Mr. Seawell: Q. And you went there also, I guess, at 4:30 or 5:00 o'clock, as Mr. Sanderson stated? A. That is right.

Q. And you had gone to a number of other bars in Sacramento during the day?

A. That is correct.

Q. I will show you this statement of Chris Maritsas and ask you if this is the statement you referred to on cross examination by Mr. Brannely?

A. Yes, it is.

Q. And do you recognize the signature at the bottom?

A. Yes. He signed it after Mr. Sanderson—he signed that after Mr. Sanderson read the statement.

Q. Did you also sign it? A. Yes.

Q. Is that your signature (indicating)?

A. Yes.

(Testimony of Alex Tschierschky.)

Q. Was there any force or duress used by either you or Mr. Sanderson? A. No.

Q. Did he give the statement freely and voluntarily? A. That is right.

Q. And the statement was to the effect that he had refilled 14 bottles of Schenley's with rum and the remaining bottles had been refilled by the bartenders pouring from one bottle [68] to the other? "I was fully aware this was against the laws of the United States and the Bureau of Internal Revenue"? Is that his statement?

A. That was his statement.

Mr. Seawell: That is all.

Mr. Kennedy: Or Mr. Sanderson's?

Mr. Seawell: Q. No, it was the statement of Mr. Maritsas, is that correct? A. Yes.

Recross Examination

Mr. Kennedy: Q. It was written by Mr. Sanderson, is that correct? A. Yes.

Redirect Examination

Mr. Seawell: Q. Well, that is the one he made in your presence and swore to that that was the truth, did he not? A. Yes.

Mr. Seawell: That is all. Dr. Love.

R. F. LOVE,

called for the Government, sworn.

Direct Examination

Mr. Seawell: Q. Dr. Love, what is your occupation?

A. Chemist, Internal Revenue Bureau.

Q. How long have you been so employed?

A. Twenty-seven years.

Q. And from what schools did you graduate?

A. Graduated from Colorado College, Bachelor of Arts, Chemistry. [69]

Q. As a Chemist? A. Yes, sir.

Q. And when was that? A. 1911.

Q. And since that time what occupation have you followed?

A. Teacher of Chemistry for five years.

Q. Whereabouts?

A. Leadville, Colorado, and Colorado College. Since then I have worked.

Q. Since then you have been employed by the United States Government, is that correct?

A. Yes.

Q. As a chemist? A. Yes.

Q. What have your duties mainly consisted of so far as an examination of whiskies and other liquors during the past twenty-seven years? Have you conducted a number of tests as to whether certain liquids are whiskies or wine or whatnot?

A. Yes.

Q. And over those twenty-seven years could you

(Testimony of R. F. Love.)

estimate roughly how many tests you have made in regard to various liquors?

A. Hundreds of thousands, I guess.

Q. You would say hundreds of thousands. And you were present all during the prohibition era, so I guess you had considerable experience then?

A. Yes, sir.

Mr. Seawell: I believe the doctor is qualified. Have you any questions on his qualifications?

Mr. Kennedy: If we have, we will ask them.

Mr. Seawell: Q. Were certain bottles of whisky brought to you sometime in the latter part of July, 1945, by Mr. [70] Sanderson, the agent here in charge, which he stated he seized in Sacramento?

A. Yes, sir.

Q. When were those brought to you?

A. The first day of August, 1945.

Q. And what did you do with those bottles after you got them?

A. Analyzed the contents of them.

Q. You analyzed the contents of these bottles?

A. Yes, sir.

Q. And how did you analyze the contents of the bottles?

A. In most of them I determined the proof or the alcoholic content, the acidity, the color and the solid matter, and in some of them whether or not they contained caramel.

Q. Now at the time you received the bottles, for the purpose of identification did you put any numbers on them? A. Yes, sir.

(Testimony of R. F. Love.)

Q. I will just show you one number, which happens to be Government's Exhibit 6 for identification, and ask you if that is the type of number that you put on each and every bottle that you examined? A. Yes, sir.

Q. You took samples from each and every bottle, doctor? A. Yes, sir.

Q. Now I will show you 149415—I will show you a bottle which is labeled Schenley's reserve, and is numbered 149415, and ask you from whom you received that bottle? [71]

A. Received it from Mr. Sanderson on August the first, 1945.

Q. And did you test it for proof?

A. I did.

Q. And what did you find the proof to be? Have you your notes? A. 85.5 proof.

Q. And the label states it should be 86 proof, is that correct? A. Yes.

Q. What else did you find in regard to that bottle?

A. I found that it had 32.4 parts of acid—I beg your pardon, 21.6 parts of acid.

Q. And what should have been in that bottle?

A. 32.4 parts.

Mr. Kennedy: Pardon me. I object to that question on the ground that it calls for an opinion and conclusion of the witness. I am not attacking the witness' qualifications as a chemist, but I believe the witness, if you develop his testimony as to the specific contents of any particular bottle insofar as

(Testimony of R. F. Love.)

proof is concerned, solids and acids, that the witness will testify that there is a variation in bottles that come from the distillery, and that what should be in the bottle is not a question—it is based upon the type of mash and everything else.

Mr. Seawell: Q. Did you use what is known as a control bottle in making these tests?

A. Yes, sir.

Q. And what is a control bottle?

A. It is an unopened bottle of the same brand as the one in question. [72]

Q. And did you have such a bottle at the time you made these tests? A. Yes, sir.

Q. And did you test against that bottle in each instance? A. I did.

Q. In other words, when you made a test of Schenley's, you had a bottle of Schenley's which had been unopened and you broke the seal and made a test of the contents of that bottle for a control?

A. Yes, sir.

Q. And if you tested for Seagram's V. O. Canadian Whiskey the same thing was done, and that was done in each instance; if you had a bottle of Old Forester Whiskey that was tested in the same way, is that correct?

Mr. Brannely: Just a moment. That is putting the answer in the mouth of the witness. It is leading and suggestive. We object to the question on that ground.

Mr. Seawell: Then what did you do in regard to the control bottles?

(Testimony of R. F. Love.)

A. I obtained as many control bottles as possible of every brand which is brought into the laboratory for analysis so that there will be something with which to compare the open or suspected bottles, and I receive a great many of unopened bottles of all brands.

Q. And you have a control bottle for each and every brand involved in this case, is that correct?

A. Yes, sir.

Q. Now you stated that the control bottle was 32.4 and your sample was 21.6, is that correct? These were acids. [73]

A. Yes, sir.

Q. As to color, what did the test show?

A. The color of the whiskey in this bottle is 7.5 and in the control bottle it was 9.5.

Q. What does that mean, 7.5 and 9.5?

A. Those figures are units on an arbitrary scale for an instrument which is used to read the color of a liquid, the depth of color. 7.5 was a lighter color than 9.5.

Q. In other words, this bottle was 2 per cent lighter than the control bottle, is that correct?

A. Well, it isn't correct exactly. It is units.

Q. Two points? A. Two units.

Q. Did you test as to solids? A. Yes.

Q. What did you find in respect to solids?

A. I found in this bottle 105.4 per cent solids and the control bottle 148.2 per cent.

Q. What does that indicate?

A. Based upon—

(Testimony of R. F. Love.)

Mr. Kennedy: Object to that as ceiling for a conclusion of the witness.

Mr. Seawell: This man is qualified as an expert. I want him to explain to the jury what he means when he says 148.2 per cent and 105.4 per cent solids. It wouldn't mean anything to the jury unless he explained it.

The Court: Go ahead.

Mr. Seawell: What does that indicate? [74]

A. These figures are based on the percentage of solid matter in the liquid. 105 parts really means 105 one-thousandths of a per cent and 148 parts means 148 one-thousandths of a per cent. The figures are small, but the difference is relatively large between the two figures, indicating that the liquor in this bottle is not the same as the liquor in the control bottle, or the same brand.

Q. Now, can you state what has been added to that bottle? A. Yes, sir.

Q. What? A. Rum.

Q. Can you state what percentage of rum?

A. No, I couldn't tell that.

Q. You can't tell the percentage, but you can tell from your test that rum has been added to the bottle, is that correct? A. Yes.

Mr. Seawell: At this time I will offer Government's Exhibit 10 for identification as Government's Exhibit 10 in evidence.

Mr. Kennedy: Same objection on the grounds heretofore urged.

Mr. Seawell: Is it admitted in evidence?

(Testimony of R. F. Love.)

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 10 in evidence.)

Mr. Seawell: Q. I will show you Government's Exhibit 11 [75] for identification and ask you if you made an analysis of the contents of that bottle? A. I did.

Q. And that is number 149416, is that correct?

A. Yes, sir.

Q. And what did you find in regard to that bottle?

A. I found the analysis of this bottle to be practically identical with the preceding one, and, therefore, as much different from the control bottle at the preceding one, and also that this bottle contains rum.

Q. You found that contains rum.

Mr. Seawell: I will offer Government's Exhibit 11 for identification as Government's exhibit 11 in evidence.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 11 in evidence.)

Mr. Kennedy: Your Honor, so I won't be reiterating my objection goes to all this?

The Court: Yes.

Mr. Seawell: Q. I will show you Government's Exhibit 12 for identification, and ask you if you examined the contents of that bottle, that being number 149417? A. I did.

(Testimony of R. F. Love.)

Q. And what did you find that bottle to contain?

A. The results of the analysis were practically identical with the preceding ones, and the bottle contains rum. [76]

Mr. Seawell: I will offer exhibit 12 for identification as Government's Exhibit next in order, in evidence.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 12 in evidence.)

Mr. Seawell: I will show you Government's Exhibit 7 for identification, numbered 149418, and ask you if you examined the contents of that bottle?

A. I did.

Q. What did you find that bottle to contain?

A. Found the contents to be similar to the preceding ones, and it also contains rum.

Mr. Brannely: What is that exhibit, Mr. Seawell?

Mr. Seawell: Number 7 for identification. I will offer this as Government's exhibit 7 in evidence.

(The bottle referred to was marked U. S. Exhibit number 7 in evidence.)

Mr. Seawell: Q. I will show you Government's Exhibit 8 for identification, numbered 149419, and ask you if you examined the contents of that bottle?

A. I did.

Q. And what did you find after examining that bottle?

(Testimony of R. F. Love.)

A. The analysis was the same as the preceding, and the bottle contains rum.

Mr. Seawell: I will offer Government's Exhibit 8 for identification as Government's Exhibit 8 in evidence.

The Court: Admitted. [77]

(The bottle referred to was marked U. S. Exhibit 8 in evidence.)

Mr. Seawell: Q. I will now show you Government's Exhibit 9 for identification, numbered 149-420, and ask you if you examined the contents of that bottle?

A. I did.

Q. Will you tell the Court what that contains, and the jury?

A. The results of the analysis were the same as the preceding bottles, and rum was present.

Mr. Seawell: I will offer Government's Exhibit 9 for identification as Exhibit number 9 in evidence.

(The bottle referred to was marked U. S. Exhibit 9 in evidence.)

Mr. Seawell: Q. I will show you Government's Exhibit 4 for identification, number 149421, and ask you if you examined the contents of that bottle?

A. I did.

Q. What did you find that to contain?

A. The results were the same as for the preceding bottles, and rum was present.

Mr. Seawell: I will offer Government's Exhibit

(Testimony of R. F. Love.)

4 for identification as Government's Exhibit 4 in evidence.

(The bottle referred to was marked U. S. Exhibit 4 in evidence.)

Mr. Seawell: Q. I will show you this bottle, number 149422, Government's Exhibit 5 for identification, and ask [78] you if you examined the contents of that bottle?

A. I did.

Q. What did you find that bottle to contain?

A. The contents were the same as the preceding, including the presence of rum.

Mr. Seawell: I will offer Government's Exhibit 5 for identification as Government's Exhibit next in order.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 5 in evidence.)

Mr. Seawell: Q. I will show you Government's Exhibit number 6 for identification, number 149-423, and ask you if you examined the contents of that bottle?

A. I did.

Q. What did you find that bottle to contain?

A. The same analysis as the preceding, including the presence of rum.

Mr. Seawell: I will offer Government's Exhibit 6 for identification as Government's Exhibit 6 in evidence.

(The bottle referred to was marked U. S. Exhibit 6 in evidence.)

The Court: Ladies and gentlemen of the jury, we will now recess until 2:00 o'clock this afternoon. Remember the admonition heretofore given you.

(Thereupon an adjournment was taken until 2:00 o'clock p.m. this date.) [79]

Wednesday, April 10, 1946—2:00 o'clock p.m.

Afternoon Session

R. F. LOVE ON THE WITNESS STAND

The Court: The Clerk will call the roll of jurors.
(Roll called.)

The Clerk: They are all present, sir.

The Court: You may proceed, gentlemen.

Direct Examination (Continued)

Mr. Seawell: Q. Dr. Love, I will show you Government's Exhibit 2 for identification, number 149424, and ask you if you have seen that bottle before? A. I have.

Q. Did you make an examination of the contents of that bottle?

A. I did.

Q. What did you find it to be?

A. The contents to be the same as the previous bottles.

Q. Referred to this morning in your testimony before adjournment?

A. Yes, sir, and it contains rum.

Mr. Seawell: I will offer this bottle, Govern-

(Testimony of R. F. Love.)

ment's Exhibit 2 for identification, as Government's Exhibit 2 in evidence.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 2 in evidence.) [80]

Mr. Seawell: Q. I will show you bottle number 149425, which is Government's Exhibit 1 for identification, and ask you if you have seen that bottle prior to today?

A. I have.

Q. Where did you see this?

A. I received it with the others.

Q. Did you make an examination of the contents? A. I did.

Q. What did you find it to contain?

A. The contents were the same as the other bottles, contained rum.

Mr. Seawell: I will offer Government's Exhibit 1 for identification as Government's Exhibit 1 in evidence.

(The bottle referred to was marked U. S. Exhibit 1 in evidence.)

Mr. Seawell: I will show you Government's Exhibit 3 for identification, the number of the bottle is 149426, and ask you if you have seen that bottle before?

A. I have.

Q. Did you receive that at the same time you received the others? A. I did.

(Testimony of R. F. Love.)

Q. Did you make an examination of the contents? A. I did.

Q. What did you find it to be?

A. The contents are the same as the other bottles, and it contains rum.

Mr. Seawell: I will offer Government's Exhibit 3 for [81] identification as Government's Exhibit 3 in evidence.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 3 in evidence.)

Mr. Seawell: Q. I will show you Government's Exhibit 29, number 149427, and ask you if you have seen that bottle before? A. I have.

Q. Did you examine the contents of that bottle? A. I did.

Q. From whom did you receive it?

A. I received it from Mr. Sanderson with the other bottles.

Q. What did you find the contents to be?

A. The contents were the same as the previous bottles, and it contains rum.

Mr. Seawell: I offer the last bottle, number 149427, as Government's exhibit next in order.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 29 in evidence.)

Mr. Seawell: Q. At this time I will show you another Schenley bottle, number 149428, and ask you if you have seen that bottle before?

(Testimony of R. F. Love.)

A. I have.

Q. Where did you receive it?

A. I received it from Mr. Sanderson with the other bottles.

Q. And did you examine the contents of that bottle? [82] A. I did.

Q. What did you find it to contain?

A. The contents are the same as the others, and it contains rum.

Mr. Seawell: I will offer Government's Exhibit 30 for identification as Government's Exhibit next in order.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 30 in evidence.)

Mr. Seawell: I will show you Government's Exhibit 31 for identification, number 149429, and ask you if you have seen that bottle before?

A. I have.

Q. Did you examine the contents of that bottle?

A. I did.

Q. From whom did you receive it?

A. I received it from Sanderson with the other bottles.

Q. What does that bottle contain—

Mr. Kennedy: Objected to—pardon me just a moment. Up to this time, your Honor, I believe the witness has testified that insofar as the Schenley bottles were concerned, that he made those tests with a control sample. Now, with reference to these bottles, I think we are entitled to know the exami-

(Testimony of R. F. Love.)

nation he made, because it is apparently a different brand of whiskey.

Mr. Seawell: That is right.

Q. Did you have a control bottle from which you made an examination of this bottle as well?

A. No, sir. [83]

Q. How did you make your examination as to the bottle of Four Roses?

A. I found that the bottle contains caramel—

Mr. Kennedy: Pardon me. The question was how did you make it?

Mr. Seawell: Q. Yes. Did you examine the contents of that bottle? A. Yes, sir.

Q. What did you find in that bottle?

A. I found it contains caramel.

Q. And what else did you find in regard to the proof?

A. The proof was 87.8 instead of 90, according to the label. Slightly under proof.

Mr. Seawell: At this time I will offer this bottle as Government's exhibit next in order—it is marked Government's exhibit 31 for identification—as Government's exhibit next in order.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 31 in evidence.)

Mr. Seawell: I will show you another bottle of Four Roses whiskey, marked 28 for identification, number 149430, and ask you if you have seen that bottle before?

A. I have.

(Testimony of R. F. Love.)

Q. Did you examine the contents of that bottle?

A. I did. [84]

Q. From whom did you receive it?

A. I received it from Mr. Sanderson with the other bottles.

Q. And what did you find the contents of that bottle to contain so far as caramel or other ingredients other than whiskey are concerned?

Mr. Kennedy: Objected to as assuming something not in evidence, no foundation laid.

Mr. Seawell: I will withdraw the question to avoid confusion.

Q. Did you make an examination of the contents of that bottle? A. I did.

Q. What did you find the bottle to contain?

A. I found that the whiskey in it contains caramel.

Q. Did you find what the proof of that bottle was? A. Yes.

Q. What was the proof of the contents of that bottle?

A. 87.6 instead of 90, according to the label.

Mr. Seawell: I will offer Government's Exhibit 28 as Government's exhibit next in order.

Mr. Kennedy: Objected to as incompetent, irrelevant and immaterial and having no relation to the case.

Mr. Seawell: Well, I think it is the very heart of the case. We are showing that the contents of that bottle is 87.6, whereas it is labeled 90 proof, which is off in percentage; we have shown there was

(Testimony of R. F. Love.)

caramel present, and it is [85] against the law to add caramel to straight whiskey.

The Court: Overruled.

Mr. Kennedy: Your Honor, may I say a word in regard to that objection?

The Court: Yes.

Mr. Kennedy: So far as these additional bottles are concerned, the only testimony that there is before the Court at the present time is that some bartenders may have put something in these bottles, but there has been no testimony whatsoever introduced with reference to these defendants.

Mr. Seawell: We have introduced testimony that these were taken from Tony Legatos' bar and that he was the owner of the bar where they came from, and Chris has said in his written statement—so there will be no confusion—he states that the remaining bottles—these are the bottles I am referring to—have been refilled by the bartenders pouring from one bottle to the other. He was fully aware that this was against the laws of the Bureau of Internal Revenue.

Mr. Kenney: May our objection go to the remaining bottles, your Honor, so that we will not have to reiterate?

Mr. Seawell: Q. I will show you another Four Roses bottle, number 149431, Government's Exhibit 27 for identification, and ask you if you have examined that bottle?

A. I did. [86]

Q. From whom did you receive that?

(Testimony of R. F. Love.)

A. I received that from Mr. Sanderson with the other bottles.

Q. And what did you find that bottle to contain?

A. I found that it contains caramel.

Q. And what did you find in regard to the proof?

A. The proof is 87.7 instead of 90, according to the label.

Mr. Seawell: I will introduce this bottle as Government's exhibit next in order.

Mr. Kennedy: Same objection, your Honor, and may my objection go to the balance of the bottles.

The Court: Overruled.

Mr. Kennedy: I beg your pardon?

The Court: I say, same ruling.

(The bottle referred to was marked U. S. Exhibit 27 in evidence.)

Mr. Seawell: Q. I will show you Government's Exhibit number 26, bottle number 149432, for identification, and ask you if you have examined the contents of that bottle? A. I have.

Q. From whom did you obtain it?

A. I received it from Mr. Sanderson with the other bottles.

Q. And did you examine the contents of that bottle? A. I did.

Q. And that is 7-Crown Seagram's Whiskey, is that correct? A. Yes. [87]

Q. What did you find that bottle to contain?

A. I analyzed it for acids, color and solids the same as the Schenley's whiskey.

(Testimony of R. F. Love.)

Q. Did you have a control bottle in this instance?

A. Yes. And comparing the figures with those of the control bottle, I concluded that it was re-filled.

Mr. Kennedy: Pardon me. Your Honor, we ask that conclusions go out——

Mr. Seawell: Well, I will ask you first——

Mr. Kennedy: ——as not responsive to the question.

Mr. Seawell: It may go out at this time.

Q. Will you tell us just what you found in regard to proof, acid, color and solids in regard to that bottle?

A. I found the acids to be 27.6, the control 27.6; the color 10.5, the control 11.5; the solids in this bottle 196 parts, and in the control 179 parts.

Q. And what did you find as to proof?

A. The proof was 87.4 instead of 86.8, according to the label.

Q. The label says 86.8 and it was 87.4?

A. Yes, sir.

Q. Now, doctor, after your examination of this bottle and comparing it with your control bottle, can you state whether or not—what is your opinion, rather, as to whether or not this is Seagram's 7-Crown whiskey?

Mr. Kennedy: Pardon me. Objected to as calling for a matter that is not the subject of expert testimony, but [88] is the whole issue in the case. That is a question for the jury.

(Testimony of R. F. Love.)

Mr. Seawell: This man is an expert. He is testifying as an expert.

Mr. Kennedy: Let him give his findings.

Mr. Seawell: He did. Now this is opinion evidence.

The Court: Proceed.

Mr. Kennedy: May the objection go to the entire line of testimony, so that I won't have to reiterate?

The Court: Overruled.

A. My opinion is that the bottle was refilled.

Mr. Seawell: I will offer Government's exhibit 26 for identification as Government's exhibit next in order in evidence.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 26 in evidence.)

Mr. Seawell: I will show you Government's exhibit for identification number 23, bottle number 149433, and ask you if you have seen that bottle before?

A. I have.

Q. And from whom did you obtain it?

A. I received it from Mr. Sanderson with the other bottles.

Q. And did you make an examination of the contents of that bottle? A. I did. [89]

Q. Will you tell the Court and jury what you found that bottle to contain?

A. I found the proof to be 87.4, the acids 24 parts, the control being 27.6; the color of this whis-

(Testimony of R. F. Love.)

key 10.5, the control 11.5; the solids of this whiskey 191.2 parts, the solids of the control 179 parts.

Q. Now, taking into consideration all of the elements of your test, can you state your opinion as to whether or not this Seagram's bottle has been refilled?

Mr. Kennedy: Objected to upon the ground that is asking for a matter for the jury to decide, and not a matter of expert testimony.

The Court: Overruled.

Mr. Seawell: He can testify to his findings.

A. It is my opinion that the bottle is refilled.

Mr. Seawell: At this time I will offer this bottle, marked Government's Exhibit 23 for identification, as Government's Exhibit next in order.

(The bottle referred to was marked U. S. Exhibit 23 in evidence.)

Mr. Seawell: Q. I will show you a Lord Calvert bottle of whiskey, Government's Exhibit 24 for identification, bottle 149424, and ask you if you have seen that bottle before?

A. I have.

Q. From whom did you receive that?

A. I received it from Mr. Sanderson with the rest of the [90] bottles.

Q. Did you make an examination of the contents of that bottle? A. I did.

Q. What did you find the bottle to contain?

A. I found the proof to be 85.8, whereas the label states that it is 86.8; I found the acids to be 30 parts, and the control bottle to contain 28.8 parts;

(Testimony of R. F. Love.)

the color of this whiskey 11, and the control 8; the solids of this whiskey 181.6 parts, and the control 104 parts.

Q. And from an analysis of this bottle and from your experience on this subject, can you tell the Court and jury what your opinion is as to whether or not it is Lord Calvert whiskey or not?

Mr. Kennedy: Same objection, your Honor, on the ground it is not a subject of expert testimony.

The Court: Overruled.

A. It is my opinion that the bottle is refilled.

Mr. Seawell: I will offer Government's exhibit 24 for identification as Government's exhibit next in order.

(The bottle referred to was marked U. S. Exhibit 24 in evidence.)

Mr. Seawell: Q. I will show you another bottle of Lord Calvert's whiskey, number 149435, which is 25 for identification, and ask you if you have seen that bottle before?

A. I have. [91]

Q. And did you make an analysis of the contents of that bottle? A. I did.

Q. From whom did you obtain it?

A. I received it from Mr. Sanderson with the other bottles.

Q. Will you tell the Court and jury what that bottle contains?

A. I found the proof to be 85.8, whereas the label states it is 86.8; I found the acid content to be 22.8 parts, and the control 28.8 parts; the color

(Testimony of R. F. Love.)

of this whiskey 10.5, and of the control 8; the solids of this whiskey 180 parts, and of the control 104 parts.

Mr. Seawell: At this time I will offer Government's Exhibit 25 for identification as Government's exhibit next in order.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 25 in evidence.)

Mr. Seawell: Q. I will show you a bottle of Old Charter straight—purports to be a Kentucky straight bourbon whiskey, number 149436, Government's exhibit 20 for identification, and ask you if you have examined the contents of that bottle?

A. I have.

Q. And from where did you obtain that bottle?

A. I received it from Mr. Sanderson with the other bottles.

Q. And what did you find that bottle to be, so far as proof [92] is concerned, and what was your examination?

A. The proof of this whiskey is 87.5, whereas the label states that it is 90; and I found caramel in this whiskey.

Q. At this time I offer in evidence Government's Exhibit number 20 for identification as Government's exhibit next in order.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 20 in evidence.)

Mr. Seawell: Q. I will show you another bottle

(Testimony of R. F. Love.)

which purports to be Kentucky straight bourbon whiskey, Government's Exhibit 21 for identification, number 149437, and ask you if you have seen that bottle before? A. I have.

Q. From whom did you obtain it?

A. I received it from Mr. Sanderson with the other bottles.

Q. Did you examine the contents of that bottle?

A. I did.

Q. What did you find it to contain?

A. I found the proof to be 87.8 instead of 90 as stated on the label, and I found it contained caramel.

Mr. Seawell: At this time I will offer as Government's exhibit next in order, Government's Exhibit 21 for identification.

The Court: Admitted. [93]

(The bottle referred to was marked U. S. Exhibit 21 in evidence.)

Mr. Seawell: I will show you what purports to be a bottle of Old Forrester whiskey, which is numbered 149438, Government's Exhibit 22 for identification, and ask you if you have seen that bottle before?

A. I have.

Q. Did you examine the contents of that bottle?

A. I did.

Q. From whom did you obtain it?

A. I received it from Mr. Sanderson with the other bottles.

Q. What did you find it to contain?

(Testimony of R. F. Love.)

A. Found the proof to be 99.4 instead of 100. The acids 79 parts, whereas the control contains 75.6 parts; the color of this whiskey 15, the control 12.5; the solids of this whiskey 204.6 parts, and of the control 164 parts.

Mr. Seawell: I will offer as Government's exhibit next in order Government's exhibit 22 for identification.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 22 in evidence.)

Mr. Seawell: Q. I will show you another bottle which purports to be Old Forrester straight bottled in bond whiskey, number 149439, Government's Exhibit number 14, for identification, and ask you if you have seen that bottle before?

A. I have. [94]

Q. And from whom did you obtain it?

A. I received it from Mr. Sanderson with the ret of the bottle.

Q. Did you make an examination of the content thereof? A. I did.

Q. What did you find it to contain?

A. Found the proof to be 99.5 instead of 100, and I found the whiskey to contain caramel.

Mr. Seawell: I will offer this bottle as Government's exhibit next in order, which is 14 for identification.

(The bottle referred to was marked U. S. Exhibit 14 in evidence.)

(Testimony of R. F. Love.)

Mr. Seawell: I will show you what purports to be an Old Hermitage brand bottle of whiskey. Government's Exhibit 13 for identification, number 149440, and ask you if you have seen that bottle before?

A. I have.

Q. And from whom did you obtain it?

A. From Mr. Sanderson with the other bottles.

Q. And did you examine the contents thereof?

A. I did.

Q. And what did it contain?

A. I found the proof to be 92.3 instead of 93, as stated on the label, and I found the whiskey contains caramel.

Mr. Seawell: I will offer Government's Exhibit 13 for [95] identification as Government's exhibit next in order.

(The bottle referred to was marked U. S. Exhibit 13 in evidence.)

Mr. Seawell: Q. I will show you another Old Hermitage bottle, number 149441, which is marked 15 for identification, and ask you if you examined that bottle?

A. I have.

Q. From whom did you obtain it?

A. I received it from Mr. Sanderson with the other bottles.

Q. Did you make an examination of the contents? A. I did.

Q. What did you find it to contain?

(Testimony of R. F. Love.)

A. I found the proof to be 92.3 instead of 93, as on the label, and also it contained caramel.

Mr. Seawell: I will offer it as Government's Exhibit next in order.

(The bottle referred to was marked U. S. Exhibit 15 in evidence.)

Mr. Seawell: Q. I will show you what purports to be a bottle of Seagram's V. O. Canadian whiskey, number 149442, Government's exhibit 16 for identification, and ask you if you have seen that bottle before?

A. I have.

Q. From whom did you obtain it?

A. I received it from Mr. Sanderson with the other bottles. [96]

Q. Did you make an examination of that bottle as well? A. I did.

Q. What did you find the contents to be?

A. I found the proof to be 85.1 instead of 86.8 as stated on the label; the acids 26.4, the control 27.6; the color of this whiskey, and of the control 6.5; the solids of this whiskey 184.8, and of the control 110.6.

Mr. Seawell: At this time I will offer the bottle numbered 16 for identification as Government's exhibit next in order.

The Court: Admitted.

(The bottle referred to was marked U. S. Exhibit 16 in evidence.)

Mr. Seawell: Q. I will show you another bottle of Seagram's V. O. Canadian whiskey, number

(Testimony of R. F. Love.)

149443, Government's exhibit number 18 for identification, and ask you if you have seen that bottle before? A. I have.

Q. Where did you obtain it?

A. I received it from Mr. Sanderson along with the others.

Q. Did you make an examination of the contents? A. I did.

Q. Will you tell the Court and jury what you found the contents to be?

A. The proof I found to be 85.4 instead of 86.8 as stated on [97] the label; the acids 27.6, the control acids, 27.6; the color of this whiskey 11, of the control 6.5; the solids of this whiskey 187.4 parts, and of the control 110.6 parts.

Q. Now, doctor, can you tell me after your analysis of the last two exhibits as to whether or not they were refilled bottles or were original products?

Mr. Kennedy: Objected to as calling for an opinion and conclusion of the witness.

The Court: If he knows.

Mr. Seawell: If he knows, in his opinion.

A. I have an opinion.

Q. What is your opinion?

A. That the bottles were refilled.

Q. I will show you bottle number 149444, labeled "Blended Scotch whiskey, Johnny Walker Black Label", and ask you if you have seen that bottle before? It is number—I think it is 17 for identification,——

The Clerk: That is right.

(Testimony of R. F. Love.)

Mr. Seawell: —number 17 for identification, and ask you if you have seen that bottle before?

A. I have.

Q. Where did you obtain that bottle?

A. I received it from Mr. Sanderson with the other bottles.

Q. And did you make an examination of the contents of that bottle? A. I did.

Q. What did you find it to contain? [98]

A. Found the proof to be 86.8, which is the same as the label; the solids 21.6 parts, whereas the control was 24 parts; the color of this whiskey 10, of the control 9; the solids of this whiskey 144.2, of the control 182 parts.

Q. Now considering your analysis and your experience in examining these types of whiskey, would you say whether or not in your opinion this is genuine Johnny Walker Black Label whiskey or has been refilled?

Mr. Kennedy: Objected to as calling for a conclusion of the witness.

Mr. Seawell: That is exactly what I am asking him for. He is an expert and qualified for such a conclusion.

The Court: Overruled.

A. It is my opinion that the bottle was refilled.

Mr. Seawell: Q. I will show you another bottle of Johnny Walker Black Label, number 149445, Government's exhibit 19 for identification, and ask you if you have seen the original of that bottle before? A. I have.

(Testimony of R. F. Love.)

Q. Where did you obtain that bottle?

A. I received it from Mr. Sanderson with the other bottles.

Q. Did you examine the contents thereof?

A. I did.

Q. What did you find it to contain?

A. Found the proof to be 86.9, whereas the label states 86.8; [99] the acids 22.8 parts, the control 24; the color of this whiskey 10, of the control 9; the solids of this whiskey 143 parts and the control 182 parts.

Q. Now can you tell the Court and jury from your experience and your examination of the contents of this bottle whether or not that is genuine Johnny Walker Black Label whiskey?

Mr. Kennedy: Objected to as calling for a conclusion of the witness.

The Court: If he knows.

Mr. Seawell: Q. In your opinion.

A. My opinion——

Mr. Kennedy: The court said if he knows.

The Court: I meant in his opinion too. Go ahead.

A. My opinion is that the bottle was refilled.

Mr. Seawell: Q. Now, doctor, after you made the examination of exhibits 1 to 31, what did you do with the bottles?

A. They have been in my possession from the time I received them until I brought them up here.

Q. When you brought them up here, what did you do with them?

(Testimony of R. F. Love.)

A. I left them in your office, in the safe.

Q. You left them in the safe? A. Yes.

Q. Did you seal the carton in my presence?

A. I did.

Q. I will show you the three cartons and ask you if those are the original cartons in which you left them, the seals of which were broken this morning?

A. Yes, I did. [100]

Q. You were present when they were taken out of the safe this morning? A. Yes.

Q. And the seals were in the condition as they were when you sealed them? A. Yes.

Q. And you placed your initials on the seals half on the top and half on the bottom?

A. I did.

Mr. Seawell: That is all.

Cross Examination

Mr. Kennedy: Q. Doctor, relative to this last exhibit, this Johnny Walker bottle, did you have a control sample on this? A. Yes, sir.

Q. And when did you procure it?

A. Well, I can't say now. I don't have the identification of that bottle with me.

Q. You don't have the identification of this bottle? A. Of the control bottle.

Q. The control bottle? A. Yes.

Q. And relative to making a control, doctor, did you take separate controls on each one of these and make a particular examination?

A. You mean a separate control for each bottle of Johnny Walker?

(Testimony of R. F. Love.)

Q. Yes.

A. No, I used the same control for all the bottles of the same brand.

Q. Well, relative to that control, I mean did you obtain a particular bottle of Johnny Walker Black Label whiskey in order [101] to test it against this bottle here?

A. I had a bottle which was labeled exactly the same as that, yes.

Q. And did you procure it for the purpose of making this particular test?

A. Well, I can't say as to that now, but we have——

Q. In other words, when did you procure that control bottle of Johnny Walker whiskey?

A. I can't say now.

Q. Can you give us any approximate time?

A. No, except within the last—or within a few months of the time I received that bottle.

Q. Yes. Well, relative to these so-called control bottles, so that it may be clear, what you did is go down and get a bottle, that is, an unopened bottle, and make certain tests from it, and that is the so-called control? Am I correct in that?

A. Yes, sir.

Q. Now, how many control bottles of Johnny Walker's Black Label have you had, we will say, in the last three years?

A. Oh, not very many. Maybe half a dozen.

Q. Half a dozen? A. Something like that.

(Testimony of R. F. Love.)

Q. And you have run these controls off of them, have you not? A. Yes.

Q. Do you have variations in the controls?

A. Oh, yes.

Q. In the Johnny Walker bottles? [102]

A. There are slight variations between controls, yes.

Q. Now, doctor, to be entirely fair with the members of the jury on the matter of proof, we will say, how far will the control bottles vary in proof?

A. Oh, one degree, possibly more—a little more.

Q. One degree or possibly more?

A. Yes.

Q. You are talking now about actual control bottles, aren't you, doctor? A. Yes, sir.

Q. These bottles that you go out and procure from a wholesaler or someone whom you have every confidence in has not tampered in any way with the bottles and on the basis of those controls they will vary from one to possibly more in the degree of proof? A. Yes.

Q. That is your testimony. Now, with reference to a control bottle where it is not being tampered with at all, the factors of heat, the factors of corked or non-corked will change the proof in that bottle, will it not?

A. You mean in a control bottle?

Q. Yes, in a control bottle that has been opened, but not tampered with.

A. Why, I don't think I understand just what you are getting at.

(Testimony of R. F. Love.)

Q. I am sorry, doctor; I know you want to. My question is this: We will take a bottle, for instance, Johnny Walker's Black Label whiskey, and the bottle will be opened and the contents will in no wise be tampered with at all, and over [103] a period of time, depending upon weather, light conditions, and also the fact that the bottle is open, the proof in the bottle will change, will it not?

A. No, sir.

Q. In other words, doctor, is it not true that insofar as an open bottle of spirits is concerned, that part of the proof will evaporate?

A. When I receive a control bottle, I analyze it immediately when I open it.

Q. Doctor, you don't understand my question. Maybe I have confused you and confused everyone else by using the word "control", so I will eliminate the factor of control; but my question is this: If you take any bottle of spirits and leave it open for any considerable length of time, the proof in the bottle is likely to change, is it not?

Mr. Seawell: I don't think that question is intelligible. I don't understand what you mean by "open". Do you mean in a bottle with the cork off or pouring it in a pan——

Mr. Kennedy: Well, strike it out just to obviate the argument.

Mr. Seawell: I don't know what you are talking about.

Mr. Kennedy: Q. Doctor, is it possible for the proof of a bottle of distilled spirits to change with-

(Testimony of R. F. Love.)

out their being the addition of any foreign substance? A. What kind of a bottle?

Q. Well, you are the expert. We would like to get—— [104]

Mr. Seawell: No, that is reasonable. Do you mean a bottle with a cork or do you mean a bottle without a cork, or a bottle with an opened cork? What are you referring to? That is what the witness is asking. That is a reasonable question. He doesn't know what you are talking about, and I certainly don't know what you are talking about.

Mr. Kennedy: Q. Will the proof of whiskey change, or will it always remain constant?

Mr. Seawell: I object to the question as unintelligible. Mr. Kennedy doesn't state what he means by an open bottle. Do you mean if you open the bottle and leave the top off to ask the chemist whether or not evaporation takes place, why ask him that question, but——

Mr. Kennedy: I prefer to ask in my own way, Mr. Seawell.

Mr. Seawell: I object to the question as unintelligible and the doctor can't answer it.

Mr. Kennedy: Maybe he can.

The Court: Proceed, gentlemen.

Mr. Kennedy: Do you understand the question, doctor?

A. I don't know whether you mean a bottle standing with a cork out of it——

Q. No, that is not my question at all. Under

(Testimony of R. F. Love.)

any circumstances at all will the proof of whiskey change?

A. It will, if it is left in an open container, yes.

Q. Yes. Now, doctor, if whiskey is left in an open container—[105] we will say the open container would be an uncorked bottle——

A. Yes.

Q. ——what would be the variation in proof in that regard?

A. It would depend on the time the bottle is open. If it is left open long enough the proof and the whole contents will disappear entirely.

Q. So insofar as the question of proof is concerned—let's strike out that question too. Doctor, every brand of whiskey—or we will take a brand of whiskey, insofar as any particular batch is concerned, it is not necessarily identical with other batches of whiskey of the same brand? For example, the Johnny Walker Black Label whiskey that was turned out in the fall of 1939 may bear no relation in exactitude to the whiskey that was turned out—the same brand of whiskey that was turned out in 1935, is that correct?

A. It would be almost exactly the same.

Q. Almost exactly, but there would be a difference?

A. Slight difference.

Q. There would be a difference, depending on the mash used and the grain used, or the district where the grain came from, all those factors have to be taken into consideration, do they not?

A. Yes.

(Testimony of R. F. Love.)

Q. It is also true, is it not, doctor, that insofar as two batches of whiskey are concerned, they are never exactly the same in all respects?

A. Not exactly, but they are very closely usually, because of the fact that they are all made out [106] of the same proposition, made in the same still, in the same way and aged in the same warehouse.

Q. Yes, but insofar as some brands of whiskey are concerned, for instance Schenley's whiskey, that is not true so far as Schenley's whiskey, they are not made in the same still and aged in the same warehouse, are they?

A. Blended whiskey is more likely to vary, yes, because of being made of different materials.

Q. That is, most of them come from different districts? Some come from Pennsylvania, some come Kentucky, some come from Iowa?

A. Yes, sir.

Q. And there is no way, doctor, in any test that you have made, that you cannot say that that is not 100 per cent pure Scotch whiskey?

Mr. Seawell: No, pure Johnny Walker Scotch whiskey, Black Label.

Mr. Kennedy: No, Scotch whiskey.

Mr. Seawell: I object to the question as not within the issues of this case. They might put one dollar Scotch whiskey, if there is such a thing, in a five dollar Johnny Walker Black Label bottle. That is what we are leading to. They might put Scotch whiskey in there, but the question before this Court is whether or not that is Johnny Walker

(Testimony of R. F. Love.)

Black Label, which is expensive whiskey. It is a lot different from——

Mr. Kennedy: Let me ask you this: You, of course, [107] weren't at the distilleries when these bottles were filled, were you? A. No.

Q. So you don't know what went into the bottles? A. No, sir.

Q. Will you answer the question, doctor, insofar as your ability to say whether or not it is or is not Scotch whiskey?

Mr. Seawell: I object to that as incompetent, irrelevant and immaterial and no bearing on the issues of this case.

Mr. Kennedy: Well, it goes to the whole substance of his test, I mean as an expert, which he has offered himself here as, and I certainly can test his qualifications to see whether or not he can say at least it is not Scotch whiskey.

Mr. Seawell: He said it wasn't Johnny Walker Black Label Scotch whiskey. That is the issue.

Mr. Kennedy: He stated in his opinion it was not Johnny Walker Black Label Scotch whiskey. First I want to find out if, in his opinion, it wasn't Scotch whiskey, and then——

The Court: Overruled.

A. I wouldn't say it wasn't Scotch whiskey at all in the bottle. It is my opinion it wasn't all Black Label.

Mr. Kennedy: Q. Doctor, my question is this: Can you state positively as a fact that wasn't Scotch whiskey? A. No, I didn't say that.

(Testimony of R. F. Love.)

Q. Now, can you state positively as a fact that whiskey was not bottled by the Johnny Walker Company and was part of the [108] original contents of the bottle?

Mr. Seawell: Just a moment. Mr. Kennedy is asking this man to testify positively as a fact. This man is only an expert witness. He doesn't purport to be testifying as to facts. He is a chemist and he is an expert in his line. He is testifying to what he found and testifying that in his opinion after an analysis what the bottle contained. He doesn't pretend to have been at the Johnny Walker factory when they made this whiskey and followed that bottle of whiskey from where it was made out to California and watched it all the time. He has only testified as an expert witness—

Mr. Kennedy: Just a moment. I will just clear up the matter on that.

Q. Doctor, you do have tests and examination which do rather consistently tell whether whiskey is Scotch or Bourbon, do you not? By which you can make that determination almost immediately?

A. Yes; if they are not mixed, of course. If they have a mixture, sometimes it is impossible to tell.

Q. But you can't always ascertain whether or not it is Scotch whiskey?

A. If it is predominantly Scotch, yes.

Q. To what degree of predominance—I will relieve you of the bottle, doctor; you don't have to keep holding it—to what degree would the variation be, doctor?

(Testimony of R. F. Love.)

A. To the degree that the characteristics of the Scotch or the [109] Bourbon, whatever it may be, can be identified. There is no fixed limit to that.

Q. Well, that, of course, doesn't mean a lot to we people who are not chemists. I understand it is a very accurate distinction; could you translate that into the form of a percentage, or give us some example so we can understand that?

A. If you are talking about solid bottles, it is very easy to distinguish between Scotch and Bourbon, but if you are talking about a mixed bottle, it is very hard to tell. A bottle that contained a lot of Scotch whiskey and a little Bourbon, it would be impossible to tell the Bourbon.

Q. With a little Bourbon?

A. That is right.

Q. But if it contained a good percentage——

A. If it contained a good percentage, yes.

Q. What percentage? Can you fix the limit?

A. I couldn't say, I couldn't give you any idea.

Q. You can give us no idea at all. Then, doctor, insofar as the examination of the bottle is concerned, or of its contents, I believe your testimony is this, that you weren't able to say from this examination of the bottle as to whether the whiskey is Scotch or Bourbon, or perhaps a combination of Bourbon and Scotch or Canadian whiskies?

Mr. Seawell: Are you speaking of this particular bottle, Mr. Kennedy?

Mr. Kennedy: Speaking of his testimony, yes.

Mr. Seawell: Well, just limit it. It is unintelli-

(Testimony of R. F. Love.)

gible to me. I don't know whether the doctor understands it or not. Are you talking about this bottle, or are you changing the subject?

Mr. Kennedy: You may have the question read, if you didn't understand it.

Mr. Seawell: Yes, may I have the question read?

(Question read by the reporter.)

Mr. Seawell: All right, he is referring to the same bottle.

The Witness: Are you referring to that bottle of Black Label?

Mr. Kennedy: Yes.

A. It is my opinion that that bottle——

Mr. Kennedy: Q. No, doctor, my question——

Mr. Seawell: Let him answer.

Mr. Kennedy: He may explain his answer, Mr. Seawell, but my question is "Are you able to determine"?

A. I can't answer that yes or no.

The Court: Determine what?

Mr. Kennedy: Determine if it is Scotch whiskey or a mixture of Scotch and Bourbon or a mixture of Scotch and Canadian whiskies.

Mr. Seawell: He has already answer that, he has already stated that if the percentage of one or the other is [111] predominant, under certain conditions he can, and under conditions he can't. If this was 90 per cent Scotch, and a little Bourbon in there, he said he could not. That would be his testimony.

(Testimony of R. F. Love.)

Mr. Kennedy: Q. You can't answer that question, doctor?

A. I can't answer it yes or no, I can only give an opinion.

Q. My question is this: From the contents of the bottle itself you can't determine; any judgment that you make will be based upon a control?

A. Not necessarily, no.

Q. What other factors enter into it, doctor?

A. I have had so many bottles that have been labeled Scotch whiskey, and the analysis was so far different from any known brand of Scotch whiskey, that I knew it could not possibly be a Scotch whiskey, without any control, just from my general knowledge of Scotch whiskey.

Q. Was that true of this bottle? A. No.

Q. So under certain very radical circumstances you can tell whether it is Scotch whiskey or Bourbon whiskey or some type of mixture?

A. Yes.

Q. That is not true of this bottle. But in the case of this bottle, however, all your opinion and your entire testimony and your conclusions are based upon comparisons with the control?

A. That is right.

Q. That is, the proof is one factor?

A. Yes. [112]

Q. And the proof, you say, in the controls, may vary from one degree? A. Yes.

Q. And the proof of this particular bottle, I believe, number 445, is 86.8—is that the control bottle?

(Testimony of R. F. Love.)

A. Yes, that is what the label states it should be.

Q. And this is 86.9? A. Yes.

Q. Now, in testifying that the proof will vary one per cent in the control bottles, that would mean that it would vary from 87.8 to 85.8? A. Yes.

Q. Doctor, insofar as solids are concerned in Scotch over the period of your experience for two or three years, speaking specifically of controls on Johnny Walker's Scotch, what will the variation be?

A. I can't give any figures now to cover the total variation, but it is relatively small. Scotch whiskey is very true to form. They are nearly all alike.

Q. Recalling your attention, doctor, to the examination you made of *Ciro's* in Los Angeles, where you took certain controls there of Johnny Walker's Scotch, did you not, of Black Label?

Mr. Seawell: You mean that case down there where they pleaded guilty? What case are you talking about?

Mr. Kennedy: Your Honor——

Mr. Seawell: What case are you talking about, *Ciro's*?

Mr. Kennedy: ——I request the Court to admonish the jury to disregard the remark of counsel. My question is [113] before the witness.

Mr. Seawell: I have a right to know what you are talking about.

Mr. Kennedy: I am asking Dr. Love a direct question if he didn't make an examination of two bottles of Johnny Walker's black label whiskey in a case involving *Ciro's* in Los Angeles.

(Testimony of R. F. Love.)

Mr. Seawell: Where and when? Let's get the time, place and persons present. Let's find out what case you are talking about. No foundation laid. I object to the question on that ground.

The Court: Sustained.

Mr. Kennedy: Q. Do you recall making an examination of Johnny Walker Black Label in connection with a case against Ciro's in Los Angeles?

A. Of course I remember the case, and I remember we had quite a number of different brands of whiskey, but as to any particular bottle, I don't remember.

Q. You have no recollection of Johnny Walker Black Label? A. No.

Q. I will ask you this question on that point: Isn't it a fact that so far as solids in whiskey are concerned, that they will vary as much as 60 points?

A. I can't answer that from memory.

Q. What would be the maximum variation in points? A. Oh, I can't say. [114]

Q. You have no recollection at all?

A. No, sir.

Q. Now, with reference to acids, what will the variation be in the control bottles?

A. It is the same as with the solids, the variation is not very great, but I can't give any actual figures.

Q. Well, doctor, of course we are laymen, and "very great" and "some percentage" don't mean very much to us. I believe your testimony is based on certain conditions, and I think we are entitled to know what the variations will be in control bottles.

(Testimony of R. F. Love.)

So if you can give us the result of your experience so far as Scotch is concerned, we would appreciate it. Would you say it would be as much as five points? A. Yes.

Q. Then in this case what would you say would be the general mean, doctor? In other words, is it around 20 or 24 or 25 or 35? What is the mean insofar as your acids are concerned?

A. The meaning?

Q. The mean for a run of control bottles. Maybe 30 or 40? From the best of your recollection and experience.

A. Well, I can't tell you that, because we don't use that figure, we use a particular bottle for a control, we don't use batches.

Q. Yes, but these particular control bottles vary, do they not?

A. I use one bottle to compare with another one bottle. [115]

Q. Yes, but if you took a control bottle two years ago and made a test insofar as the acids are concerned, and you took another control bottle, we will say this year, and made the same tests, there would be variations? A. Not very much.

Q. Well, there would be variations, however?

A. There might.

Q. Might be?

A. They might be identical. It very often happens that the figures are identical.

Q. And it quite frequently happens that you have variations, doesn't it? A. Yes.

(Testimony of R. F. Love.)

Q. Because of different conditions under which the whiskey was made? A. Yes.

Q. In other words, doctor, they may follow the same formula and use the same materials, but they never will get the identical result in the making of any whiskey, is not that correct?

A. We do have identical figures in some bottles, yes.

Q. Now can you give us any help at all as to what the variation will be among the control bottle as to solids?

A. If I could go back to that previous question, one of the samples in evidence, 7-Crown, the acids—

Q. No, I am talking about this bottle here, doctor, I am talking about Johnny Walker Black Label.

A. You want to know about the figures being identical—— [116]

Q. Pardon me?

A. You want to know about the figures being identical. I said sometimes they are identical, and I have one illustration here I would like to show you. The 7-Crown whiskey, I found 27.6 parts of acids, and the control bottle was 27.6. The identical figure.

Q. I don't think you understood my other question, doctor—it may be a minor detail—I said that the product would never be identical; I didn't say that the figures would not be identical. But going back to our question now, can you give us your best testimony as to what the variation will be among

(Testimony of R. F. Love.)

the control bottles in Johnny Walker Black Label whiskey as far as the acids are concerned?

A. I can't give very definite figures from memory, but as I said before, the various brands of Scotch whiskey are very uniform, and I doubt whether the acids in Black Label Scotch would vary five points.

Q. Would vary five points?

A. Yes. That is, over a period of years. We have been analyzing these samples for years, and we have found that the Scotch whiskey is very uniform over a great many years.

Q. And in this case the control bottle was 24, so a variation—if we assumed that might be a general average, the variation might be from 29 to 19 insofar as acids are concerned, isn't that correct?

A. Yes. [117]

Q. And the variation here where your control bottle was 24 and the sample—that is Exhibit number 19—was 22.8 comes within the percentage of variation?

A. Yes, sir.

Q. Now, doctor, what is the test that you make on color?

A. I use an instrument which is called a tintometer.

Q. And how is that used, doctor? Can you give us what the process is?

A. It is a small glass cell with parallel sides so that an exact thickness of liquids is contained in it. We use a half inch cell, which means that the thickness of the liquid through the cell is exactly one-

(Testimony of R. F. Love.)

half inch, and certain colored glass slides are matched against that half-inch of liquid and slides are added until the color of the slides exactly matches the color of the whiskey. Each one of those slides has a number on it, and the numbers are added, so when I say a whiskey has a color rating of 10 it means that the slides, the brown slides which I used to match the color of whiskey added up to 10.

The Court: Ladies and gentlemen of the jury, we will now recess for 15 minutes. Remember the admonition heretofore given you by the Court.

(Recess.)

The Court: The Clerk will call the roll of jurors.
(Roll called.) [118]

The Clerk: They are all present, sir.

The Court: You may proceed.

Mr. Kennedy: Q. You had explained, Mr. Love, the manner of testing color, and, in short, it is a photo-electric measurement, isn't it?

A. No, it is not a photo-electric, it just makes use of the eye alone.

Q. You don't use the photo-electric measurement in these cases? A. No.

Q. Have you ever used that? A. No.

Q. Now, insofar as the control bottles are concerned, we will take a dozen control bottles, what will the variation in color be in points?

Mr. Seawell: That is color you are talking about?

(Testimony of R. F. Love.)

A. Again I can't answer very well. I don't remember the variations.

Mr. Kennedy: Q. Well, in the case of Scotch, which is a light whiskey, it will be not as great as in some of the other whiskies, of course? That is true, isn't it? In other words, your heavy bourbons will vary a great deal more in color than the light Scotches?

A. More variation.

Q. Yes, and would you say that the variation could be as much as three points?

A. Yes, it might possibly.

Q. In the control bottles? A. Possibly.

Q. Now the control bottle here was 9?

A. Yes, sir. [119]

Q. And the sample that you worked with was 10?

A. Yes, sir.

Q. And it came within the variation?

A. Yes, sir.

Q. Now insofar as solids are concerned, can you reflect somewhat more directly and give us some estimate of what the variation will be in solids so far as Johnny Walker Black Label Scotch is concerned? That is, the control bottles?

A. I think ten or fifteen parts probably would be the maximum.

Q. It will go as low as 120 sometimes, will it not?

A. No, I don't think Black Label will, no.

Q. What would you say the lowest it would go is, sir? A. Well, I don't remember.

(Testimony of R. F. Love.)

Q. 130 wouldn't make you suspicious in a control bottle, would it? A. 130?

Q. In the control bottle.

A. I wouldn't expect to see Black Label that low. The one I used was 182.

Q. But it can drop much lower than that?

A. As I say, the best I can remember now is it probably wouldn't be more than 10 or 15 points lower than that, but I can't remember exactly.

Q. But you can give us no positive testimony what the variation would be?

A. No, I can't remember.

Q. So now just take in your own findings here, Mr. Love, insofar as this Scotch is concerned, this particular bottle [120] of Scotch, each one of them, with the exception of solids, comes within the limits of variations that you have enumerated, that is, so far as proof is concerned, the color is concerned, the acids are concerned, and you could very well anticipate that you might take a bottle of Johnny Walker Scotch as a control bottle and find those ingredients in the percentages that you have enumerated for the sample bottle?

A. No, I don't think so. I think the solids are too far off.

Q. No, I said leave off the solids, on which you have given us no specific testimony.

A. Well, that is true for the possible control bottles, and the control bottle I used here was the—was the latest control bottle I had.

Q. Well, it is only fair for the jury to know,

(Testimony of R. F. Love.)

is it not, Dr. Love, that insofar as a control bottle is concerned, that there will be wide variations?

A. No, I wouldn't say wide variations.

Q. Well, I mean in the percentages that you have given us?

A. Well, those are not very wide variations.

Q. Well, for instance we will take the proof here. You wouldn't consider the factor of one-tenth of one per cent as being an indication——

A. No.

Q. You would discount that entirely, because you allowed a one per cent variation?

A. I would leave the proof out in all of these, except in two or three cases where the proof [121] was 97 instead of 90, but the others weren't enough to make a point of.

Q. That is in every bottle that is here insofar as the proof is concerned? A. Yes.

Q. And then again so far as color is concerned, in reference to this particular bottle, that some comes within the limits of permissible variations?

A. Are you talking now about that Black Label?

Q. Yes, this bottle.

A. It is within the possible range, but compared with the control which I used, which is the best control I had at the time, I would say it wasn't.

Q. And likewise with the—and again I say it is only fair for the jury to know that if you had taken another bottle from a different place, from a different batch of Johnny Walker, maybe a bottle three

(Testimony of R. F. Love.)

or four years old, that there would be no—that control would not be identical with the one you used?

A. It might not be identical, no.

Q. And the same is true with the acids?

A. Yes, sir.

Q. Now, generally, doctor, with reference to your testimony on the variation in proof, color, acids, solids, that is true with reference to—excluding the 14 Schenley bottles, that is true with reference to all of these bottles, is it not, that the controls will vary? [122]

A. Yes, they will vary some.

Q. And generally within the limits that you have remarked for the bottle of Johnny Walker Black Label?

A. I think so, yes.

Q. Doctor, you didn't tamper with these stamps in any way at all, did you?

A. Cancel them?

Q. Tamper with these stamps in any way?

(The witness shook his head in a negative manner.)

Q. And these stamps are the type where you take off the top or the cork, why the stamp is broken?

A. Yes.

Q. And every stamp was destroyed when it came into your possession?

A. Was cut, yes.

Q. Cut by removing the stopper?

A. Yes.

Mr. Kennedy: That is all.

The Court: Do you wish to call the next witness?

Mr. Seawell: Mr. Brannely—

Mr. Brannely: No, I have no questions, your Honor.

(Testimony of R. F. Love.)

Redirect Examination

Mr. Seawell: Q. Referring to the bottles of Four Roses which are in evidence here, in your analysis you found caramel in these bottles of Four Roses. Did you ever find in a control bottle of straight whiskey any caramel at all?

A. No, sir. [123]

Q. And I see that occurred also in these bottles of Old Charter whiskey, that you found in those caramel present. Did you ever find caramel in any control bottles?

A. No, sir, not in straight whiskey.

Q. Not in straight whiskey, and these purport to be straight whiskey. In other words, those are not straight whiskies, is that not true? Where they have caramel?

A. No, sir.

Q. And in Old Hermitage, did you ever find any caramel in an Old Hermitage bottle, which happens to be Government's Exhibit 13?

A. No, sir.

Q. It purports to be straight whiskey. And you found caramel in the two bottles of Old Charter you examined, is that correct?

A. Yes, sir.

Q. And you never find any rum in any Schenley Reserve whiskey?

A. Not in an unopened bottle.

Q. There shouldn't be any rum in a whiskey bottle?

A. No.

Q. And the variation where you use a control bottle—take for instance the Lord Calvert bottle which is number 149445, I notice the solids in that

(Testimony of R. F. Love.)

case, the sample was 180 and the control was a hundred. That is a variation of 80, practically—79.6. Would you say there was any possibility of being any error in that case that that was not a refilled bottle? A. No, sir, I don't think so.

Q. And in the bottle that Mr. Kennedy was talking about, the control was 182, and the sample was 143. That would be a variation of 39 per cent. Is there any question in your mind when you have such a variation in solids as to whether or not this Johnny Walker Black Label bottle he is referring to does not contain Johnny Walker Black Label Scotch whiskey? A. No, sir.

Q. In other words, as to every bottle you have been examined about today, it is your opinion as an expert that every bottle—in other words, from number 149415 to 149445 inclusive—is a refilled bottle, is that correct? A. Yes, sir.

Mr. Kennedy: Objected to as calling for a conclusion of the witness, and leading and suggestive.

Mr. Seawell: I am asking for his opinion as an expert witness.

Mr. Kennedy: Ask him what his testimony is, Mr. Seawell, don't tell him. Let him speak for himself.

Mr. Seawell: Q. I will ask you this, then, put the question this way, doctor: In your opinion were all the bottles, number 149415 to 149445, which are Government's exhibits 1 to 31, inclusive, refilled bottles?

Mr. Kennedy: Objected to as calling for a con-

(Testimony of R. F. Love.)

clusion of the witness on a vital issue involved in the case.

Mr. Seawell: In your opinion, based on an analysis of [125] each and every bottle, as an expert witness, is that true?

Mr. Kennedy: Same objection, your Honor.

The Court: What is the question?

Mr. Seawell: I have asked him in his opinion—I have asked him about a number of bottles—I am simply doing it to save time—he has testified as an expert witness to a number of bottles, but I think in trying to hurry this morning I eliminated two or three bottles, and I am simply asking him if, in his opinion as an expert witness, after examining each and every bottle he has referred to, if in his opinion all the exhibits, 1 to 31, are refilled bottles.

Mr. Kennedy: Objected to on the same grounds.

The Court: Overruled.

A. It is my opinion, yes, sir.

Mr. Seawell: That is all, doctor.

Mr. Kennedy: That is all. [126]

LAVERNE LEWIS,

called for the Government, sworn.

Direct Examination

Mr. Seawell: Q. Mrs. Lewis, where do you reside? A. 910 Seventh Street.

Q. Sacramento? A. Sacramento.

Q. And how long have you lived in Sacramento?

(Testimony of Laverne Lewis.)

A. I have lived here about 25 years, I would say.

Q. And have you been employed by Tony Legatos, the defendant in this case?

A. Yes, I have been.

Q. And were you employed by him from, oh, we will say from the first day of August, 1945, and prior thereto for several years?

A. I went to work for him, I would say, the first of 1941.

Q. The first of 1941, and you worked for him continuously until when?

A. Well, until just very recently, the last few days.

Q. The last few days?

A. Yes. I was off about seven months during that time.

Q. But you were working for him, we will say, around the first of 1945 until the end of 1945, is that correct?

A. Yes.

Q. For that one year particularly we are interested in?

A. Yes, sir. [127]

Q. And what were your duties in connection with the operation of Mr. Legatos' business?

A. Well, I was a clerk in his place, or book-keeper, whatever—like that.

Q. Where was his office located during that period, 1945?

A. 220 Ochesner Building.

Q. Do you recall sometime in February or thereabouts in 1945 having a conversation with Mr. Legatos in regard to the disposition of a large quantity of rum that he had obtained?

(Testimony of Laverne Lewis.)

A. Yes, I do.

Q. And where did the first conversation that you recall in that regard take place?

A. Took place in the Log Cabin Tavern.

Q. Do you know who owns that Tavern?

A. Mr. Legatos.

Q. And what was said by Mr. Legatos at that time to you? Was anyone else present that you recall?

A. No, I don't recall anyone else present at that time.

Mr. Kennedy: Your Honor, I object to any conversation relative to Chris Maritsas, on the grounds that he wasn't present.

Mr. Seawell: Yes, that is correct. This will be limited to Mr. Legatos.

Q. And what was said by Mr. Legatos at that time?

Mr. Brannely: Just a moment. There is no proper foundation before the Court and we object to it on that ground.

Mr. Seawell: Well, maybe the time can be fixed more [128] certain.

Q. What is the time, the month or day, as far as you can recall?

A. I would say it was around the first of February, between the first and fifteenth of February.

Q. First of February, what year?

A. 1945.

Q. Now, what was said by Mr. Legatos at that time in regard to this large quantity of rum?

(Testimony of Laverne Lewis.)

A. He said, "I have got 40 or 50 cases here and I am going to move it."

Q. Did he tell you how he was going to move it?

A. He said, "I am going to give each one of my managers so much and ask them to press it in their sales."

Q. Do you know where this rum was stored at that time? A. 701 J.

Q. And do you know whether or not it was moved from those premises? A. Yes, I do.

Q. And do you know whether or not a large quantity, a large number of cases of it was moved to 621 K Street, the Golden Tavern?

A. I know some of it went there, I don't know how much.

Q. And did you hear Mr. Legatos on other occasions refer to this rum and state that the managers had to get rid of it?

Mr. Brannely: Just a moment. That is leading and suggestive.

A. Just press the sales.

Mr. Brannely: Just a moment. That is leading and suggestive, your Honor. We object to it on that ground. [129]

Mr. Seawell: Q. Well, what did you hear him say? Did you hear other conversation in regard to this rum?

A. No, only what I had to say to him myself, what we talked over between ourselves.

Q. What was said at that time by yourself and Mr. Legatos?

(Testimony of Laverne Lewis.)

A. He said, "I am going to get rid of this rum and brandy." He said, "I am overstocked on it."

Q. Now do you know who owns the premises at 621 K Street, Sacramento, who owns the business at that location, the Golden Tavern?

A. Yes, Mr. Legatos does.

Q. You have kept the books on that?

A. I have helped on that, yes.

Q. Now, are you acquainted with the other defendant, Chris Maritsas? A. Yes, I am.

Q. Did you know he was working for Mr. Legatos in 1945 as manager? A. That is right.

Q. And do you know how long he had worked for Mr. Legatos?

A. Well, before I went to work for him.

Q. Well, he was working there at least in 1941, is that correct, when you went to work there?

A. Yes, sir.

Q. And he still was working for him up to a few days ago when you quit, is that correct?

A. Yes.

Q. Now do you remember having a conversation with Mr. Chris Maritsas sometime after July 19, 1945, in regard to this rum which is in question in this case? A. Yes, I do. [130]

Q. And where did that conversation take place?

A. At the Royal Grill on Sixth Street.

Q. Who was present besides yourself?

A. Oh, there was several people there.

Q. Do you recall who they were? A. Yes.

Q. Who?

(Testimony of Laverne Lewis.)

A. George Klostos and John Lambreth.

Q. Do you recall what Mr.—when was that, so far as time is concerned, in months and days, as near as you can recall?

A. Well, the conversation was about three months ago.

Q. And what was said by Mr. Maritsas at that time in reference to this rum?

Mr. Brannely: Your Honor, I object to any conversation in reference to a conversation on behalf of the defendant Mr. Legatos. He wasn't present at that conversation.

Mr. Seawell: That may be limited to Mr. Maritsas.

Q. What was said by yourself, and what was said by him at that time?

A. I asked him why in the world did he ever put the rum in the bottles there, or the brandy, whatever he did. He said, "I didn't think I was doing any harm to anybody, because the rum cost more than the Schenley's."

Q. Did he state at that time that he had put rum in some of these bottles which are in question in this case?

Mr. Kennedy: Objected to as leading and suggestive.

Mr. Seawell: Well, I will withdraw the question. [131]

Q. What did he state in regard to how the rum got into the bottles which are Government's exhibits 1 to 31?

(Testimony of Laverne Lewis.)

A. He said he wouldn't put it in there if he thought it was doing any harm to anybody, because the rum cost more than the Schenley's.

Mr. Seawell: That is all.

Cross Examination

Mr. Brannely: Q. Mrs. Lewis, at this conversation you had with Mr. Legatos in February, the first part of February, 1945, you stated, I believe, that at 701 J Street there was 40 or 50 cases of rum?

A. Yes.

Q. And, of course, you being an employee of Mr. Legatos for a long period of time, you had personal knowledge of the fact that he not only had on sale premises in connection with his business, but he also had off sale premises?

A. That is right.

Q. Yes. Now you know that the 40 or 50 cases of rum that were on hand at 701 J Street were taken to other places, don't you? I believe you testified to that, Mrs. Lewis?

A. That is correct.

Q. Yes. And was some of that rum taken to the off sale premises?

A. He only has one off sale premises.

Q. Where is that?

A. At 622 K.

Q. 622 K. And did he not have any off sale premises at other [132] locations?

A. Not at that time he didn't.

Q. Not at that time. How many places, do you know, during that period of time, if you know, did

(Testimony of Laverne Lewis.)

Mr. Legatos own? That is, with alcoholic beverage licenses.

A. You want where he was sole owner or partner, or what?

Q. Either way, in which he was interested.

A. Well, there is the Lunchette, a partner there; Tony's Cafe, he is the sole owner; the Red Front, he is a partner; the Empire, he is a partner; and the Golden.

Q. That is in Sacramento? A. Yes.

Q. And you know that he has business interests in connection with that business outside of the City of Sacramento, too? A. That is right.

Q. Located at different places in the northern part of California, isn't that correct?

A. Uh huh (yes).

Q. Yes. Can you tell us, if you know, without enumerating the number of places, Mrs. Lewis, approximately how many of these establishments he is interested in?

A. Oh, I would say he has about five places in Vallejo.

Q. About five additional places in Vallejo?

A. In Vallejo. Not all of them with liquor.

Q. Yes. Well, he is a restaurant man, isn't he, as well as a tavern operator?

A. That is right. [133]

Q. And he conducts quite a few restaurants in the northern part of the State of California? That is true, isn't it? A. Yes.

(Testimony of Laverne Lewis.)

Q. Now, he never told you—in this conversation with you I imagine that your relationship with him was very pleasant at the time, isn't that correct?

A. Yes.

Q. And he merely said that he had the 40 or 50 cases of rum there and he wanted to get rid of it and wanted to send it to his other places, isn't that correct?

A. Yes.

Q. He never said anything about mixing rum with whiskey, did he, Mrs. Lewis?

A. No. I didn't want to convey that idea.

Q. You didn't want to convey that idea?

A. No.

Q. And you, of course, have been an employee of his up to a short time ago for a good many years? That is your testimony? That is correct, is it not? You know of your own knowledge, do you not, Mrs. Lewis, that Mr. Legatos insists that his places be operated according to the law and within the law? You know that, don't you? Do you know that, Mrs. Lewis?

A. Yes.

Mr. Brannely: You do. That is all. Cross examine.

Mr. Seawell: Just a moment.

Mr. Brannely: I mean, redirect, if you have any.

Redirect Examination

Mr. Seawell: Yes. [134]

Q. Have you talked to anyone about this case since we talked together yesterday?

A. Yes, I have talked to lots of people.

Q. Who?

(Testimony of Laverne Lewis.)

A. My phone has rang incessantly since this case came to prominence in this town.

Q. Did you talk to Mr. Legatos? A. Yes.

Q. And Mr. Brannely? A. Yes.

Q. Is that what caused you to change your story before the Court today?

Mr. Brannely: Just a moment. There is no indication this witness changed her story, and I ask your Honor to instruct the jury to disregard the purport of that question.

Mr. Seawell: I will withdraw the question and proceed with another question.

Q. Didn't you tell me, in the presence of Mr. Sanderson yesterday in my office, and in the presence of my stenographer that in your opinion Mr. Tony Legatos did not operate his business in a legal manner——

Mr. Brannely: Just a moment.

Mr. Seawell: Just a moment. Let me finish my question.

Mr. Brannely: Your Honor——

The Court: Just a moment. There is the place (indicating) not all around the court room.

Mr. Brannely: Yes, and I desire, your Honor, on behalf of my client, Mr. Legatos—— [135]

The Court: There is no reason to get exercised——

Mr. Brannely: ——to object to that question on the ground it is improper redirect examination and it is an attempt to cross examine his own witness.

Mr. Seawell: That is correct, and I am laying the foundation for having been taken by surprise.

(Testimony of Laverne Lewis.)

The Court: Overruled. Go ahead.

The Witness: Mr. Seawell, will you ask me the question again?

Mr. Seawell: Q. Didn't you tell me yesterday in my office in the presence of Miss Souza, my stenographer, and Mr. Sanderson, the agent in this case, and myself that Mr. Tony Legatos did not operate his bar in a lawful manner?

A. I didn't say that, I said in a very careless manner.

Q. And didn't you say he knew about the rum being put into these bottles, in your opinion?

A. Yes, I might have.

Mr. Brannely: Well, now, just a moment. Your Honor, I am going to make an objection to protect my client here. He says if in her opinion he knew the rum was put into those bottles. Your Honor, we certainly object to that as being an improper question.

The Court: There is no objection before the Court.

Mr. Brannely: Well, we are making the objection.

Mr. Seawell: Just a minute. May it please the Court, [136] Mr. Brannely asked this woman if in her opinion he operated these bars in a lawful manner. Now I am on redirect asking her if she didn't tell me yesterday that in her opinion Mr. Tony Legatos always knew about this rum going into bottles, because he told these men to force this rum and to get rid of it.

(Testimony of Laverne Lewis.)

Q. Isn't that what you told me?

Mr. Brannely: Just a moment. Your Honor, I object——

The Witness: I said he said to push the rum and brandy sales.

Mr. Seawell: Q. And in your opinion he knew it was being mixed?

Mr. Brannely: Just a moment before you answer the question. We stand on the objection there; it is not a question of her opinion. That is immaterial, your Honor. She is testifying to facts, not what her opinion might be.

Mr. Seawell: That is right.

Mr. Brannely: And we object to it upon the ground her opinion is not testimony in this case and it is incompetent, irrelevant and immaterial. We stand upon that objection, your Honor.

Mr. Seawell: I would never have asked the question if you had not asked her if in her opinion——

Mr. Brannely: I didn't ask for any opinion.

Mr. Seawell: Let me finish. If in her opinion he ran [137] the business in a lawful manner.

Mr. Brannely: I didn't ask for an opinion. I asked if she knew as a fact.

The Court: Proceed.

Mr. Seawell: That is all.

Mr. Brannely: That is all. Thank you, Mrs. Lewis.

Oh, may I ask you just one more question, please, Mrs. Lewis? Will you take the stand again?

(Testimony of Laverne Lewis.)

Recross Examination

Mr. Brannely: Q. You stated that you talked to me, didn't you, in response to one of Mr. Seawell's question? A. That is right.

Q. Well, it is a fact I asked you what you told Mr. Seawell, isn't that correct?

A. That is right.

Q. And you told me you would rather not discuss it with me, didn't you?

A. I told you I didn't like your attitude.

Q. Yes. And you didn't tell me anything about it, wasn't that correct, Mrs. Lewis?

A. That is right.

Mr. Brannely: That is all.

Mr. Seawell: That is all.

Mr. Kennedy: Just a moment. [138]

Recross Examination

By Mr. Kennedy:

Q. What was the date that you had the conversation with Chris Maritsas?

A. About two or three months ago, Mr. Kennedy.

Q. Now will you give us that whole conversation again, please?

A. Yes, I will. I asked him—he brought up the subject about being arrested in this case, and I asked him, I says, "Chris, why in the world did you ever mix that brandy and rum and put that in the whiskey?"

(Testimony of Laverne Lewis.)

He said, "Well, I didn't think I was doing any harm to anybody or hurting anybody, because it cost more than the whiskey."

Q. By the way——

Mr. Kennedy: That is all.

Mr. Seawell: That is all. Thank you.

Mr. Ben H. Butler.

BEN H. BUTLER,

called for the Government, sworn.

Direct Examination

Mr. Seawell: Q. Mr. Butler, what is your occupation?

A. I am an Investigator with the Alcohol Tax Unit.

Q. How long have you been so employed?

A. I am in my twelfth year.

Q. And you were so employed continuously for 12 years up to [139] date, is that correct?

A. Yes, sir.

Q. And now, Mr. Butler, were you present in the United States Commissioner's hearing in this building on this floor at the time Mr. Chris Maritsas was arraigned, and Mr. Tony Legatos?

A. Yes. You are referring to the hearing on October 22nd?

Q. 22nd, 1945. A. Yes, I was.

Q. And who was present, if you recall?

(Testimony of Ben H. Butler.)

A. Both defendants here, Chris Andrew Maritsas and Tony Legatos, with an attorney, the U. S. Commissioner, Mr. Klein, myself and you.

Q. And do you recall what Mr. Maritsas stated at that time in regard to refilling the bottles—the first 14 bottles in this case, for your information, are the Schenley bottles which the chemist has testified contained rum—and in regard to the remaining bottles?

A. Yes, sir. He testified that he filled—I don't recall whether he said 14 bottles, but he filled some bottles with half rum, and that the remaining bottles he didn't fill, but had been filled by the bartenders at the close of business by pouring remnants from old bottles in—Small amounts of remaining whiskey into other bottles.

Q. And do you recall how long he stated he had worked for Tony Legatos?

A. As I recall, he said six or seven years.

Mr. Seawell: That is all. The Government rests, may it please the Court. [140]

Mr. Brannely: Your Honor, I think there is only five minutes. May we recess until tomorrow morning, your Honor?

The Court: Yes. The Court will recess until tomorrow morning at 10:00 o'clock.

Remember the admonition heretofore given you by the Court, ladies and gentlemen.

(Recess.) [141]

Thursday, April 11, 1946, 10:00 o'clock a.m.

The Clerk: United States vs. Tony Legatos and Chris Maritsas.

Mr. Seawell: Ready.

Mr. Brannely: Ready.

Mr. Kennedy: Ready.

The Court: The Clerk will call the roll of jurors.

(Roll called.)

The Clerk: They are all present, sir.

The Court: You may proceed.

Mr. Brannely: The case is with the defendant?

Mr. Seawell: It is stipulated that Mr. Legatos owns the bar at 621 K Street, is that correct, the sole owner?

Mr. Brannely: Yes, we stipulate that he is the licensee of those premises.

Mr. Kennedy: At this time, on behalf of Chris Maritsas, I make a motion in the alternative on the first count, a motion for acquittal.

The Court: Denied.

Mr. Brannely: Your Honor, on behalf of the defendant Legatos I make the same motion.

The Court: Denied.

Mr. Brannely: Mr. Coghill. [142]

EDWARD THOMAS COGHILL,
called for the defendant, Legatos; sworn.

Direct Examination

Mr. Brannely: Q. Your name is Edward Coghill? A. Yes, sir.

Q. Where do you reside, Mr. Coghill?

A. I reside at 861-41st Street.

Q. And you are a resident of the City of Sacramento? A. Yes, sir.

Q. What is your occupation?

A. Owner, printer.

Q. Now, Mr. Coghill, do you know Mr. Tony Legatos? A. Yes.

Q. How long have you know him?

A. Since 1939.

Q. Do you know other people who know him?

A. I do.

Q. Do you know what his general reputation in this community is as a law abiding citizen?

Mr. Seawell: Just a moment. You haven't laid a foundation.

Mr. Brannely: In what respect?

Mr. Seawell: You haven't asked him if he knew other people in the community who knew him.

Mr. Brannely: I have asked that question. Asked him if he knew other people who knew Tony Legatos.

Mr. Seawell: That is not the proper way to approach the subject. He must ask him if he knows other people in this [143] community.

The Court: That is correct.

(Testimony of Edward Thomas Coghill.)

Mr. Brannely: Q. Mr. Coghill, do you know other people in this community who know Mr. Legatos? A. I do.

Q. You do. Do you know what his general reputation in this community is for a law abiding person? A. I do.

Q. Is it good or bad? A. Good.

Mr. Brannely: Cross examine.

Cross Examination

Mr. Seawell: Q. Did you know that Mr. Legatos is charged with having run a bar in which he was selling rum in the place of whiskey? Did you know that? A. I know he was charged with it.

Q. Yes. And do you know that his employee has admitted that he had filled a number of bottles, some 14 bottles, with rum, whiskey bottles with rum?

A. I do not.

Q. If you knew those facts, would that change your opinion in any regard as to the reputation of Mr. Legatos? A. It would not.

Q. It would not affect you one way or the other whether they refilled bottles in the bar or not?

Mr. Brannely: That is objected to as incompetent, irrelevant and immaterial.

Mr. Seawell: I want to ask the witness——

Mr. Brannely: The question assumes something not in [144] evidence.

Mr. Seawell: Why, Mr. Chris Maritsas has stated in a statement that “I personally refilled 14 bottles of Schenley Reserve blended whiskey with one-half Ron Manana rum, imported rum, 86

(Testimony of Edward Thomas Coghill.)

proof. I have been doing this refilling for about ten days myself. The remaining bottles have been refilled by the bartenders pouring from one bottle to the other. I was fully aware this was against the laws of the Internal Revenue Department."

Mr. Brannely: Your Honor——

Mr. Seawell: Let me ask the question.

Mr. Brannely: May I make an objection?

The Court: Gentlemen.

Mr. Seawell: May I present the question, then he can make his objection?

The Court: Yes.

Mr. Seawell: Taking that fact into consideration, would that in any way change your opinion?

A. It would not.

Mr. Seawell: That is all.

Mr. Brannely: That is all. Thank you, Mr. Coghill. Mr. Holmes. [145]

WALTON E. HOLMES,

called for the defendant Legatos; sworn.

Direct Examination

Mr. Brannely: Q. Your name is Walton E. Holmes? A. That is correct.

Q. What is your occupation, Mr. Holmes?

A. Vice-President, Secretary of the Capital National Bank.

Q. And you reside in Sacramento?

(Testimony of Walton E. Holmes.)

A. I do.

Q. Do you know the defendant at the bar of this court, Mr. Tony Legatos? A. I do.

Q. How long have you known him?

A. Approximately 20 years.

Q. And do you know other people in this community who know him? A. Yes.

Q. Do you know what his general reputation in this community is as a law abiding person?

A. Yes, I do.

Q. Is it good or bad? A. Good.

Mr. Brannely: Cross examine.

Cross Examination

Mr. Seawell: Q. Do you know this man personally or socially or in a business way?

A. Well, all three ways.

Q. And did you know that his employee had admitted refilling other bottles with rum,—whiskey bottles with rum? A. I did not.

Q. And did you know that—you heard the statement I read this morning didn't you?

A. I did. [146]

Q. And if you knew those facts would that change your opinion in any regard as to his reputation?

A. It would have to be proven to me very strongly.

Q. Well, assuming it was proven, would that change your ideas in any way—

Mr. Brannely: Your Honor—

(Testimony of Walton E. Holmes.)

Mr. Seawell: No——

Mr. Brannely: Your Honor, permit me to state my objection. I don't want to appear argumentative to the Court, but what his employees do without his knowledge certainly cannot be imputed to Mr. Legatos here. The question is improper for that reason, and we base our objection on that ground.

The Court: Overruled.

Mr. Seawell: May it please the Court—you overruled the objection?

The Court: Yes.

Mr. Seawell: Q. You may answer.

A. I don't know how to answer that question. There would be a lot of factors that would enter into it. How I would form my opinion just in a flash, I would say instantly—it is hard to answer that question, Mr. Seawell.

Q. Well, assuming that one of his managers did state, as I have stated, that he refilled bottles over a period of at least ten days, and that he knew that the other bartenders were pouring whiskey from, say, an Old Taylor bottle, or, rather, in this case, an Old Forrester bottle into a Schenley bottle, [147] or vice-versa, and charged whiskey prices or the price for the more expensive whiskey——

Mr. Kennedy: Objected to as assuming a fact not in evidence.

Mr. Seawell: Q. Assuming that fact, and assuming that Mr. Legatos had told his secretary that he had some 40 or 50 cases of rum and that he

(Testimony of Walton E. Holmes.)

told her that "I have got 40 or 50 cases here and I am going to move it," and he stated, "I am going to give each one of my managers so much and ask them to press their sales," and assuming also that he stated, "I am going to get rid of this rum and brandy," he stated, "I am overstock on it." Would all that enter into——

Mr. Kennedy: Just a moment.

A. Who made that statement?

Mr. Seawell: Mr. Legatos made that statement to Mrs. LaVerne Lewis, his secretary and book-keeper.

Mr. Brannely: Just a moment, Mr. Holmes. Now I object to that question on the ground it is a compound question, that it assumes something not in evidence, that it is incompetent, irrelevant and immaterial, and on the further ground, your Honor, it is improper cross examination.

The Court: Overruled.

Mr. Kennedy: Same objection on behalf of the defendant Maritsas.

The Court: Overruled. [148]

Mr. Kennedy: And on the further ground it is a misstatement of Mrs. Lewis' testimony.

Mr. Seawell: I am reading from the reporter's transcript, Page 33 at Lines 6 to 25 and Page 34 at Lines 1 to 7, Mr. Kennedy.

A. Well, I don't really know how to answer that question, because of what I know of Mr. Legatos I don't believe——

Mr. Seawell: Q. No——

(Testimony of Walton E. Holmes.)

Mr. Kennedy: Let the witness answer.

Mr. Seawell: Yes, answer either yes or no, and then you may explain your answer.

A. I don't really believe that Mr. Legatos would do that.

Mr. Seawell: I move to strike out the answer as not responsible.

Q. Answer yes or no, and then explain your answer.

A. The question is not clear. There are a lot of factors——

Q. I will withdraw the question and try to make it clear to you, Mr. Holmes. What I am asking you is this: That assuming Mr. Legatos owned a bar known as the Golden Tavern, and assuming he has a manager there who has said under oath that he refilled some 14 Schenley whiskey bottles with rum and that he knew the bartenders from time to time had poured the whiskey from an Old Forrester bottle into an Old Charter bottle, or from an Old Forrester bottle into a Schenley Black Label bottle, and assuming that he had told his secretary—[149] Mr. Legatos now is talking to his secretary—, “I have got 40 or 50 cases here and I am going to move it,” and he further stated—this is Legatos now— “I am going to give each one of my managers so much and ask them to press it in their sales”; and assuming Mr. Legatos further said, “I am going to get rid of this rum and brandy, I am overstocked on it”; would that in any way change your opinion as to his reputation?

(Testimony of Walton E. Holmes.)

A. Well, I would say this——

Q. No, will you please answer yes or no and then explain your answer.

Mr. Brannely: For the purpose of the record, your Honor, we make the same objection, on the grounds it is incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Seawell: It either would or would not change your opinion, Mr. Holmes. Either yes or no.

A. No, on any individual——

Mr. Seawell: I ask that be stricken. I want it yes or no——

Mr. Brannely: Your Honor, that is a question that can't be answered yes or no. A lot of words is being put in the witness' mouth here. It is the same type of question as "Do you beat your wife any longer"? It is a compound question and it cannot be answered in that manner, and that is the basis of our objection. If your Honor would compel Mr. Seawell to reframe it, we would have no objection at all. [150] It assumes a lot of things not in evidence.

Mr. Seawell: What?

Mr. Brannely: And it is a question that is not capable of being answered yes or no.

Mr. Seawell: What does it assume that is not in evidence?

Mr. Brannely: It assumes he had knowledge of the fact that this was going on; it assumes that he had knowledge of the fact that the bartenders

(Testimony of Walton E. Holmes.)

were doing things like that, your Honor. It assumes a lot of things are in evidence that are not in evidence.

Mr. Seawell: I don't think you listened to the question. I will repeat the question.

The Witness: May I ask your Honor now in respect to that? It is just like this: For instance, if Mr. Seawell or someone said to me that—let's assume that Mr. Seawell or somebody else——

Mr. Seawell: Just a moment. I am going to object to Mr. Holmes——

Mr. Brannely: Just a moment. The witness is addressing his Honor.

Mr. Seawell: I understand that, but I want the court to indulge me for a moment if he is going to make a statement to the jury. All I am asking him is a very simple question, whether or not the facts I have related, assuming them to be facts, would it change his opinion. [151]

The Witness: I would like to ask his Honor a question.

The Court: No, you answer the question of Mr. Seawell.

The Witness: All right, I will ask you, Mr. Seawell——

Mr. Seawell: No, I object to that. I want the witness to answer yes or no.

The Witness: I don't know how I can answer yes or no.

Mr. Seawell: You can't answer it yes or not?

A. No.

Mr. Seawell: That is all.

(Testimony of Walton E. Holmes.)

Redirect Examination

Mr. Brannely: Q. But, Mr. Holmes, if Mr. Legatos had in his employ a person who had placed rum in Schenley whiskey bottles, mixed it with the Schenley whiskey, and Mr. Legatos had no knowledge of that, would that affect your statement---

Mr. Seawell: Just a moment.

Mr. Brannely: May I finish my question?

Mr. Seawell: Well, it is so obviously an improper question---

Mr. Brannely: Please let me finish my question.

Q. Would that affect your testimony in regard to the good general reputation that Mr. Legatos enjoys in this community?

Mr. Seawell: Just a moment. I object to that as incompetent, irrelevant and immaterial, outside the direct examination, has no bearing on the character of the defendant in this case.

Mr. Brannely: It is something you brought out.

Mr. Seawell: Just a moment—oh. no it isn't.

The Court: Overruled.

Mr. Brannely: You may answer, Mr. Holmes.

A. Well, I would answer that question the same as I answered Mr. Seawell. I couldn't answer that question.

Mr. Brannely: I see. Thank you very much, Mr. Holmes. Mr. Zoller.

GEORGE E. ZOLLER,

called for the defendant Legatos; sworn.

Direct Examination

Mr. Brannely: Q. Your name is George E. Zoller? A. Yes.

Q. What is your occupation, Mr. Zoller?

A. Banking.

Q. In the City of Sacramento? A. Yes.

Q. Do you know the defendant at the bar in this Court, Mr. Tony Legatos? A. Yes.

Q. How long have you known him?

A. Fifteen or twenty years.

Q. And do you know other people in this community who know him? A. Yes.

Q. Do you know what his general reputation in this community is as a law abiding person?

A. As far as I know it is good.

Mr. Brannely: Cross examine. [153]

Cross Examination

Mr. Seawell: Q. Did you ever discuss his reputation with other persons, Mr. Zoller?

A. Not particularly.

Q. Is he a customer of the bank? A. Yes.

Q. You have heard the question—I don't know whether it was clear or not to you—I asked Mr. Holmes, assuming this to be the fact, that Mr. Legatos owned the bar at 621 K Street known as the Golden Tavern, and assuming that his bartender or manager stated that he had refilled some 14 bottles, which are in evidence, and the remainder of

(Testimony of George E. Zoller.)

the bottles had been poured from one to another, the liquor from one to another, and refilled those bottles with rum, and assuming his secretary testified that he stated to her, "I have got 40 or 50 cases here and I am going to move them"—referring to rum—and he further stated, "I am going to give each one of my managers so much and ask them to press it in their sales," and further told her, "I am going to get rid of this rum and brandy; I am overstocked with it": Would that in any way change your idea——

Mr. Brannely: Just a moment, your Honor,——

Mr. Seawell: ——of the reputation of Tony Legatos in this community? A. No.

Mr. Brannely: Just a moment.

Mr. Seawell: It has been answered. [154]

Mr. Brannely: We ask that the answer go out for the purpose of making an objection on the same grounds heretofore stated.

Mr. Seawell: I don't understand it. Mr. Zoller has testified the man is of good reputation, and now you are objecting to it.

The Court: Denied. Proceed.

Mr. Seawell: That is all. I haven't anything further.

Mr. Brannely: That is all. Thank you, Mr. Zoller.

Mr. Kennedy: Call Mr. Maritsas.

CHRIS ANDREW MARITSAS,

one of the defendants, called on his own behalf;
sworn.

Direct Examination

Mr. Kennedy: Q. Mr. Maritsas, you are one of the defendants in this action? A. Yes.

Q. And you are how old? A. Sixty-three.

Q. How long have you lived in Sacramento?

A. Twenty-five years.

Q. How long have you worked for Tony Legatos?

A. Seven years—six years—eight years, something like that.

Q. What is your duty? [155]

A. Oh, just relieving bartenders around there and work there around and about.

Q. A little louder, please. And where do you work? A. Huh?

Q. Where do you work? A. 621 K.

Q. And what is the name of the place?

A. Golden Tavern.

Q. Yes. Now, Mr. Maritsas, you recall the incident of July the 17th and 18th when Mr. Sander-son and Mr. Tschierschky, the Government agents, came and visited the premises known as the Golden Tavern where you were employed? A. Yes.

Q. And at that time they questioned you?

A. Yes.

Q. And what did you tell them with reference to the 14 bottles of Schenleys?

A. I told them I filled 14 bottles of Schenley

(Testimony of Chris Andrew Maritsas.)

with the rum, and, of course, to stretch out with the whiskey, because I was short of Schenley's at the time, and it was good stuff to put in there, that is all.

Q. And you admitted that later to Mr. Butler?

A. Yes.

Q. At the preliminary hearing? You remember Mr. Butler testified? [156]

A. Yes, I know him.

Q. And likewise to Mrs. Lewis, who testified here yesterday? A. Yes, sir.

Q. All right. Now, let me ask you this question: Insofar as that rum was concerned, what kind of bottles did it come out of?

A. That Manana rum.

Q. What was the character of the bottles with reference to strip stamps? A. They——

Mr. Seawell: Just a moment; I am going to object. It is incompetent, irrelevant and immaterial. If he refilled the bottles as he stated—it is clearly against the law if he put rum in whiskey bottles, which he says he did.

Mr. Kennedy: Your Honor, I think the jury is entitled to know exactly what he did——

Mr. Seawell: He has testified to what he did, that he put rum in bottles and sold it as whiskey.

Mr. Kennedy: Yes, and now I asked him what was the character of the rum as to revenue stamps.

Mr. Seawell: I misunderstood you.

Mr. Kennedy: Will you proceed?

A. I took it from the bottles that were full.

(Testimony of Chris Andrew Maritsas.)

Q. What kind of stamps were on them?

A. Government stamps. [157]

Q. Government stamps. Now let me ask you this, Mr. Maritsas; did you at any time tamper with these stamps that are on these bottles?

A. No, sir.

Q. Did you change them in any way at all?

A. No.

Q. Did you do anything with them at all other than what you do when you break the seal and destroy the stamp? A. No, sir.

Q. You destroyed the stamp as in every other bottle? A. Yes, sir.

Mr. Kennedy: That is all.

Mr. Seawell: I take it——

Mr. Brannely: May I cross-examine the witness?

Mr. Seawell: You cross-examine the witness?

Mr. Brannely: Yes. May I examine him? He is a witness in the case.

Mr. Seawell: You mean call him as your witness?

Mr. Brannely: I don't think we have to.

Mr. Seawell: I think you do. I have never heard of the defendant cross-examining his witness.

Mr. Brannely: We will ask his honor for a ruling on it; I want to cross-examine the witness.

The Court: Overruled.

Mr. Seawell: Go ahead. [158]

(Testimony of Chris Andrew Maritsas.)

Cross Examination

By Mr. Brannely:

Mr. Brannely: Q. Mr. Maritsas, I believe you stated that you have been employed by Mr. Legatos for a period of approximately 7 years?

A. 7 years.

Q. Is that your testimony? A. Yes.

Q. Now, has that 7 years of employment taken place in the Golden Tavern at 621 K Street?

A. Yes.

Q. The entire period of time has been there?

A. Yes.

Q. Now, how frequently or how often did you see Mr. Tony Legatos at the Golden Tavern?

A. Sometimes——

Mr. Seawell: Just a moment. I object to it as outside the direct examination.

The Court: Sustained.

Mr. Brannely: Your Honor, as I understand it, if I exceed the scope of the direct examination I make the witness my own.

Mr. Seawell: That is right.

Mr. Brannely: And I am willing to do that if I exceed the scope of the direct examination.

Mr. Seawell: Well, call him as your own witness if you want to.

Mr. Brannely: May I ask the question, your Honor?

Mr. Seawell: No, I object to it as outside the scope [159] of the direct examination.

The Court: Sustained.

(Testimony of Chris Andrew Maritsas.)

Mr. Brannely: Your Honor, it seems to me that it would be entirely within the scope of the direct testimony. As I recall Mr. Maritsas' testimony, he says that he has been employed in the Golden Tavern for a period of about 7 years.

Mr. Seawell: That is right.

Mr. Brannely: Now, I am just going into the question regarding employment.

Mr. Seawell: You are going into another subject matter altogether.

The Court: The Court has ruled.

Mr. Brannely: All right, I will make Mr. Maritsas my own witness, your Honor.

Mr. Seawell: You are calling him as your witness?

Mr. Brannely: Yes, calling him as my witness.

Q. How frequently did you see Mr. Legatos at the Golden Tavern?

A. Sometimes——

Mr. Seawell: Just a moment. If you are going to make him your own witness, may I cross-examine him, and then you call him as your witness?

Mr. Brannely: Do you want to conduct it that way?

Mr. Seawell: Yes.

Mr. Brannely: I have no objection, Mr. Seawell, go right ahead. [160]

Cross Examination

By Mr. Seawell:

Q. You stated you worked 7 or 8 years for Mr. Legatos? A. Yes.

(Testimony of Chris Andrew Maritsas.)

Q. You have no interest in that business, have you? A. No.

Q. You don't profit in the sale of liquors and rum, do you? A. What?

Q. You don't profit in the sale of liquors and rum? A. No.

Q. It doesn't make any difference to you what is sold, then? A. No.

Mr. Seawell: You are the manager; you simply work for Tony Legatos. That is all.

Direct Examination

By Mr. Brannely:

Q. Mr. Maritsas, I believe I asked you how frequently you——

Mr. Seawell: You are now calling him as your witness?

Mr. Brannely: Yes, as my witness.

Q. How frequently you saw Tony Legatos at the Golden Tavern? A. Sometimes——

Mr. Seawell: Just a moment. I object to that as incompetent, irrelevant and immaterial how often he sees Tony Legatos.

Mr. Brannely: Your Honor, that goes to the essential element of the indictment, the wilfullness and knowledge of [161] Mr. Legatos, and it goes directly to the heart of the case, and I think it is absolutely a proper question.

Mr. Seawell: I don't see how it has any bearing on the guilt or innocence of the defendant.

The Court: Overruled.

(Testimony of Chris Andrew Maritsas.)

Mr. Brannely: Q. Mr. Maritsas, you may answer the question.

A. What was it?

Q. The question I asked was how often did you see Tony Legatos at the Golden Tavern?

A. Sometimes I see him two weeks, and sometimes one month.

Q. Does he work at the place? A. No.

Q. He is the owner? A. He is the owner.

Q. Now, during the entire period of your employment, Mr. Maritsas, by Mr. Tony Legatos, has he ever given you any instructions to put rum in Schenley's whiskey or in any other bottle?

A. Never give me any instructions of any kind, nothing.

Q. So far as you know, what you did down there in putting the rum——

Mr. Seawell: Now, just a moment——

Mr. Brannely: Just a moment, please, until I finish my question.

Q. So far as you know, Mr. Maritsas, about what you did down there, did Mr. Legatos have any knowledge? A. No.

Mr. Seawell: Just a moment. I ask it be stricken until [162] I make my objection.

The Court: Yes.

Mr. Seawell: At this time, may it please the Court, I object to the question as leading and suggestive.

Mr. Brannely: Q. Did you ever, prior to the 19th day of July, when you signed that statement,

(Testimony of Chris Andrew Maritsas.)

did you ever have any discussion with Tony Legatos regarding the placing of rum with whiskey?

A. No.

Q. Never did? A. No.

Q. So far as you know, did Tony Legatos have any knowledge of what you did down there?

Mr. Seawell: Just a moment. Have you finished the question?

Mr. Brannely: Yes, I have finished the question.

Mr. Seawell: I object on the ground it is leading and suggestive and calls for hearsay testimony on the part of the witness.

Mr. Brannely: That is all.

Cross Examination

By Mr. Seawell:

Q. As a matter of fact, Tony Legatos checked very closely on the liquor, did he not?

A. Well, I don't know anything about that at all.

Q. And when you needed rum, he sent you rum, is that right? A. Not me. [163]

Q. Well, he sent it to the bar?

A. Well, I don't know.

Q. And he came in there very often, sometimes twice a week?

A. Sometimes two weeks, sometimes a month, sometimes don't come there for a month and a half.

Q. And sometimes twice a week?

A. Well, I didn't see him there.

(Testimony of Chris Andrew Maritsas.)

Q. You aren't there all the time? A. No.

Q. So you don't know how often he comes there, do you? So far as you know he may come there every day? A. Well, I don't see him.

Q. But you aren't there all day, are you?

A. No.

Q. The bar is open from 10:00 in the morning till 12:00 at night? A. Yes.

Q. What shift did you work on July 18, 1945?

A. 4:00 to 12:00.

Q. So you don't know whether Mr. Legatos was there in the morning when the bar opened up to 4:00 o'clock, do you? A. No.

Mr. Seawell: That is all.

Mr. Brannely: That is all. Mr. Legatos. [164]

TONY LEGATOS,

one of the defendants, called in his own behalf, sworn.

Direct Examination

By Mr. Brannely:

Q. Will you state your name, please?

A. Tony Legatos.

Q. Where do you live, Mr. Legatos?

A. 1040 Forty-fourth Street.

Q. In the city of Sacramento?

A. Yes, sir.

Q. How long have you lived in Sacramento?

A. Oh, since '18, 1918.

(Testimony of Tony Legatos.)

Q. Since 1918? A. Yes.

Q. What is your occupation?

A. Restaurant man.

Q. And do you operate bars in connection with your restaurants?

A. In connection with the restaurants.

Q. Yes. Approximately how many restaurants and bars do you operate, Mr. Legatos?

A. I have around 16 or 17 restaurants and bars together.

Q. 16 and 17 restaurants and bars?

A. Yes, sir.

Q. And they are located in the City of Sacramento?

A. Some in Sacramento, some in Vallejo, some in Frisco.

Q. In northern California?

A. Northern California, yes.

Q. I see. Now, Mr. Legatos, you have heard for the past couple of days testimony regarding Chris Maritsas putting rum into whiskey bottles at the Golden Tavern? A. Yes. [165]

Q. Did you know that was being done there?

A. No.

Q. When is the first time that you had any knowledge of that at all? That that has been done?

A. The day they came around and they notified me to go to the Golden Tavern.

Q. And was that about noon on the 19th day of July? A. About that time, yes.

Q. About that time, yes. And did you tell the

(Testimony of Tony Legatos.)

agents there, the alcoholic control agents there that you knew nothing about it.

A. That is right. I told them I knew nothing about it.

Q. That you knew nothing about it?

A. Yes.

Q. And that you had given your employees instructions to obey the law?

A. That is right.

Mr. Seawell: Are you testifying, Mr. Brannely, or the witness? I think the questions are leading and suggestive, putting words into the witness' mouth.

Mr. Brannely: Q. Now, Mr. Legatos, how do you operate your business?

Mr. Seawell: Let him state how he operates the businesses.

Mr. Brannely: Q. Yes. How do you operate these various businesses?

A. I have a manager. [166]

Q. You have a manager? A. Yes.

Q. And you, of course, have to depend——

Mr. Seawell: Now, just a moment. I am going to object to Mr. Brannely putting suggestive ideas in the witness' mouth. You ask him questions.

The Court: Yes, ask questions.

Mr. Brannely: I will reframe my question.

Q. How do you conduct these various business establishments?

A. The business is run with the manager every place.

(Testimony of Tony Legatos.)

Q. The business is run with the manager in every place? A. Yes, every place.

Q. Now, a former employee of yours, Mrs. Lewis, took the witness stand yesterday and stated that she had a conversation with you around the first part of February, 1945. Did you have a conversation with her? A. That is right.

Q. And I believe she further testified that you stated to her that you had 40 or 50 cases of rum at 701 J Street in premises known as the Log Cabin? A. That is right.

Q. You told her that?

A. I told her I had it.

Q. And you told her you wanted to send it out to the other places to sell it?

A. I told her—we talk over, and I said we send to different establishments the rum, but whether it is around 50 cases——

Mr. Seawell: Q. You told her this?

A. What to send—— [167]

Mr. Kennedy: Let the witness answer. I can't hear the witness' answer.

Mr. Seawell: I can't hear it either.

Mr. Kennedy: Mr. Seawell is interrupting.

Mr. Seawell: I want to hear the answer. I can't hear it. May the answer be read?

Mr. Kennedy: Let us hear the answer.

The Court: Yes.

The Witness: You say I talk with Mrs. Lewis to send the rum to different establishments, is that it?

(Testimony of Tony Legatos.)

Mr. Brannely: Q. Yes.

A. Sure we talk, yes.

Q. When you were telling her——

Mr. Seawell: Just ask what the conversation was.

Mr. Brannely: I have to call the man's attention to a part of the conversation——

Mr. Seawell: No, let's have all the conversation.

Mr. Brannely: Did you, at the time you had this conversation with her in which you stated you were going to send the rum to the different establishments, did you have any intention in your mind——

Mr. Seawell: Just a moment——

Mr. Brannely: Just a moment until I finish my question.

Q. Did you have any intention in your mind, Mr. Legatos, that that rum should be sent to your various establishments and mixed with whiskey?

A. No, sir. [168]

Q. And you didn't convey that impression, did you? A. No.

Mr. Seawell: I object to what impression he conveyed and ask the answer be stricken.

The Court: It may be stricken.

Mr. Brannely: Q. Now, Mr. Legatos——

Mr. Seawell: May he be instructed to wait until I have a chance to object, may it please the court? He is answering before I can put in objections.

Mr. Brannely: Q. Mr. Legatos, among your

(Testimony of Tony Legatos.)

establishments is the New Tony's Cafe, is that right?

A. That is right.

Q. That is 422 L Street?

A. That is right.

Mr. Brannely: Cross examine.

Cross Examination

Mr. Seawell: Q. And you are familiar with all the laws and rules in relation to the conduct of bars, aren't you?

A. Yes, sir.

Mr. Kennedy: I object as calling——

Mr. Seawell: Oh, no——

Mr. Kennedy: Pardon me——

Mr. Seawell: He said he is, and that's the end of it.

Q. Now, Mr. Legatos, you spend most of your time in Sacramento, don't you?

A. Sometimes, not all the time.

Q. No, not all the time, but most of your time?

A. Lots of time I spend in Vallejo.

Q. But you spend most of your time in Sacramento? A. I reside here.

Q. That is right, and you have your office in the Oschner Building? A. That is right.

Q. And during 1945, up until August, 1945, you spent most of your time in Sacramento?

A. That is right.

Q. And you go to these bars that you own, do you not, is that right?

A. I go in, but very seldom.

(Testimony of Tony Legatos.)

Q. And you keep books on how much liquor each bar disposes of? Do you not?

A. That is right.

Q. And you hire an accountant to go over these records with you? A. That is right.

Q. And you went over them with your book-keeper, is that right? A. That is right.

Q. So you know how much each bar is making and how much they are selling every day, don't you? A. I can't say every day.

Q. But for practical purposes you do?

A. That is right.

Mr. Seawell: That is all.

Mr. Brannely: That is all. Thank you, Mr. Legatos.

Your Honor, I have some other witnesses coming at 11:00 o'clock and then we are going to close. It will be very, very short. May we recess until 11 o'clock? [170]

The Court: Ladies and gentlemen of the jury, we will recess for—how long?

Mr. Brannely: Until 11:00.

The Court: 11:00 o'clock. Remember the admonition heretofore given you by the Court.

(Recess.)

The Court: Call the roll of jurors.

(Roll called.)

The Clerk: They are all present, sir.

The Court: You may proceed, gentlemen.

Mr. Brannely: Mr. Elmer.

FRANK RAYMOND ELMER,

called for the defendant Legatos, sworn.

Direct Examination

By Mr. Brannely:

Q. Will you state your name, please?

A. Frank Raymond Elmer.

Q. What is your occupation?

A. Owner of the Elmer Paper Company.

Q. And do you have any other occupation, Mr. Elmer?

A. No, sir—well, I might correct that. I am supervisor of Sacramento County, if that is an occupation. I don't know.

Q. Yes. And you reside in the City of Sacramento? A. Yes, sir.

Q. Do you know the defendant at the bar of this court, Mr. [171] Tony Legatos?

A. I do.

Q. How long have you known him?

A. Between 18 and 20 years.

Q. And do you know other people in this community who know him? A. Yes, I do.

Q. Do you know what his general reputation in this community is as a law-abiding person?

A. Well, it has always been of the highest that I know of.

Q. It is good or bad? A. Good.

Mr. Brannely: Cross examine.

(Testimony of Frank Raymond Elmer.)

Cross Examination

Mr. Seawell: Q. And if you knew that Mr. Legatos operated a bar at 621 K Street known as the Golden Tavern——

A. Yes.

Q. ——and if you knew also that he had a manager who admitted filling a number of bottles, to-wit, 14 Schenley bottles of whiskey with rum over a period of time, and if you knew that Mr. Legatos was fully aware of all the internal revenue laws of the United States, and if you knew that his secretary testified that he said, “I have got 40 or 50 cases here”—referring to rum—“and I am going to move it,” and if you knew he also told his secretary that, “I am going to give each one of my managers so much and ask them to press it in their sales”—referring to this rum—and if you knew he further stated, “I am going to get rid of this rum and brandy, I am overstocked on it”; then, as I say, knowing those facts, [172] and knowing they actually did fill some 14 bottles with rum in one of these bars, would that in any way change your idea——

Mr. Brannely: Objected to——

Mr. Seawell: Just a moment. Would that in any way change your idea of him as a law-abiding citizen?

Mr. Brannely: Just a moment. I object to that as incompetent, irrelevant and immaterial, your Honor, assumes something not in evidence, and it is improper cross examination.

(Testimony of Frank Raymond Elmer.)

Mr. Seawell: I don't know what it assumes not in evidence.

The Court: Overruled.

Mr. Seawell: Q. Would that in any way change your testimony?

A. It would, if it was proved that Mr. Legatos had done that sort——

Q. You understood the question, is that right?

A. Yes, sir.

Q. Would that change your testimony in regard to his reputation?

A. If it was proven to me that he did that——

Mr. Seawell: Well, there is testimony to that effect. Thank you.

Redirect Examination

Mr. Brannely: Q. In connection with your last answer, if it was proven that Mr. Legatos had knowledge and assented to that, is that not what you mean? A. Yes. [173]

Recross Examination

Mr. Seawell: Q. Then I will reframe the question I asked you—I don't know whether you understood it—if you knew that Mr. Legatos told his secretary that, “I am going to get rid of this rum and brandy, I am overstocked with it,” and if he stated, “I have directed my managers to press their sales in regard to this rum,” and then if you knew that they actually did fill whiskey bottles with rum, half

(Testimony of Frank Raymond Elmer.)

rum and half whiskey, would that in any way change your idea of the reputation of Mr. Legatos?

Mr. Brannely: That is objected to on the same grounds I have stated, your Honor.

The Court: Overruled.

Mr. Seawell: Q. Either yes or no, and then you may explain your answer.

A. I don't think I can answer it yes or no. I don't believe, Mr. Seawell——

Mr. Seawell: Q. I want it either yes or no, and if you can't answer it, say so. A. Yes, sir.

Q. Mr. Seawell: It would. Thank you.

Redirect Examination

By Mr. Brannely:

Q. Mr. Zoller, if an employee had been doing this, and if it were shown to you that Mr. Legatos had no knowledge that the employee had placed rum in whiskey bottles, would that change your testimony regarding his good [174] general reputation as being a law-abiding citizen?

Mr. Seawell: Just a minute. That is assuming he didn't have knowledge of it. The evidence is to the contrary.

Mr. Brannely: I submit the entire testimony proves that he had no knowledge——

Mr. Seawell: There is no evidence to that effect.

Mr. Brannely: Mr. Legatos testified, for one, and no single person testified that he did have knowledge of it.

Mr. Seawell: Well, you haven't been reading the evidence.

Mr. Brannely: You may answer, Mr. Zoller.

A. No.

Mr. Brannely: That is all. The defense rests, your Honor.

The Clerk: Mr. Kennedy, you rest?

Mr. Kennedy: We rest.

The Clerk: Any rebuttal?

Mr. Seawell: The government rests.

The Clerk: Argument, sir?

Mr. Kennedy: Your Honor, at this time we renew our motion for acquittal on the first and second counts of the indictment.

The Court: Denied.

Mr. Brannely: Your Honor, on behalf of the defendant, Mr. Legatos, I join in that motion and make it in his behalf.

The Court: Denied. [175]

Mr. Seawell: Counsel, may it please the Court—

Mr. Kennedy: Pardon me just a moment. We are entitled, I believe, under the new rules, to be informed of the instructions prior to argument.

The Court: They will be submitted to you.

Mr. Kennedy: Pardon me, your Honor?

The Court: They will be submitted to you.

Mr. Kennedy: No, prior to the argument, we are entitled to be advised of the instructions—

Mr. Seawell: What section?

Mr. Kennedy: It is a section of the new rules

—so we will be able to make our argument to the jury, your Honor.

The Court: Yes. Ladies and gentlemen of the jury, we will recess until 2:00 o'clock this afternoon. Remember the admonition heretofore given you.

(Thereupon an adjournment was taken until 2:00 o'clock P.M. this date.) [176]

Thursday, April 11, 1946

2:00 o'clock p.m.

The Court: Call the roll of jurors.
(Roll called.)

The Clerk: They are all present, sir.

The Court: You may proceed.

OPENING ARGUMENT ON BEHALF OF THE GOVERNMENT

Mr. Seawell: May it please the court, counsel and ladies and gentlemen of the Jury: As I stated in my opening remarks the Government would prove that on or about the 18th day of July, 1945, the agent, Mr. Sanderson, and the other agent went to a bar which is owned by Tony Legatos at 612 K Street, known as the Golden Tavern Bar; that they went there on the morning of that day. There was no question about their entry; they simply went in and asked to see the stock, and the bartender said, "Go ahead," or words to that effect.

They identified themselves, and they then ex-

amined and took some bottles, in number forty, and applied what is known as the Williams test.

I don't believe it is necessary to dwell on the contents of these bottles to any great extent. Mr. Maritsas this morning took the stand and he testified that he, himself, poured rum into 14 of the bottles. He also admitted in his statement, [231] which is in evidence, that he did put this rum into whiskey bottles and that he had been doing it for a period of ten days. There is no denial of that, at least, and he said the remaining bottles were refilled by the bartenders pouring from one to the other.

In other words, they would take any old bottle, they would take a Four Roses bottle and pour some Old Charter in or take a Seagram's bottle and pour that in, as they saw fit. There is no denial of those facts in this case. I see no reason to dwell on that at this time.

The Government next produced the chemist. He testified that in these bottles labeled as straight whiskies, such as Four Roses—and although it states that is a blend of straight whiskies,—it isn't a blend of distilled spirits, it is a blend of straight whiskies. In other words, all the whiskies in this bottle are supposed to be five years or more old. They took a number of old whiskies and blended them together.

The chemist testified that in his opinion all those bottles had been refilled, and, as a matter of fact, in all these straight whiskey bottles he found caramel.

I am sure the Court will instruct you that it is against the law to add anything with the exception

of water at the distilleries to straight whiskies, whether it be bottled in bond straight whisky or straight whiskey that is not bottled [232] in bond, but which is straight whiskey. It is positively against the law to do that, and when any foreign substance such as caramel or what not is found in a bottle it must have been added by someone, and as the defendant Chris Maritsas says, he himself poured from one bottle to the other, and where he got the caramel is something for the jury to decide.

At any rate, he did violate the law by re-using the bottles.

Now, as for Chris, I think that we can forget him for the purposes of this argument, at least so far as I am concerned, unless I hear some arguments by the defendant. He has taken the stand and said, "Yes, I violated the law." I guess he says, "Well, this is not a serious offense and maybe the jury will acquit me." I don't know exactly what his argument will be by Mr. Kennedy.

To me it is clear. He went before the United States Commissioner, and I put Mr. Butler on and Mr. Butler told you that he admitted to the facts the day he went there and he admitted to the employee, Mrs. Lewis, and he has admitted apparently to everybody that has talked to him, "Yes, I did it."

Now we come down to the next phase of the case, and that is Tony Legatos.

The defense apparently, as I see, is going to be raised—it is usually raised in this type of case, "Well, somebody has got to be the fall guy. Here is the Government, they have chemists who are going

to testify these bottles were refilled. [233] They have 31 bottles somebody refilled, somebody has to be the fall guy."

So they say, "Well, the proprietor, we don't want to make him the fall guy. Let's pick up some old donkey, let's pick out Chris. Maybe he doesn't know it is serious. Let's say he did it."

Don't forget, Chris wasn't there the first day they came in. It was the next day they came in and he and Legatos came in the next day and then is when he volunteered and said, "Yes, I did it."

What is he trying to do? It is obvious to me, and I am sure it is to you all, ladies and gentlemen of the jury. They put the heat on him. You notice that Tony was there when the agents came back the next day, to be sure he said, "I did it, and I did it alone."

So it is the old case; they had many cases in the old prohibition days; let the donkey, as they called the working man, the man that carried on the operation, let him take the blame.

But here we come to the reason. What reason would Chris have to do that? This is a reasonable world, and there must be a reason for something. This man is a reasonable man. Why would he do that?

Well, there might possibly be two or three reasons why a man would do that: He might want to get in good with the boss. [234] But this man has been there seven years. He is an old employee, a trusted employee, the manager where he is there, he had the day shift, from 4:00 in the afternoon 12:00 at night. Why would he have to get in good with

his boss? He has worked for this man for eight years. He has drawn a salary. What reason would he have to get in good with his boss?

There is no reason. They were getting along fine. So what other reasons would he have? He wasn't on a percentage deal. If he was on a percentage deal he would try to swell the profits and instead of making \$10 a day, he will make \$20 a day. But Mr. Legatos testified he wasn't on a commission deal, he was on a salary deal. What reason would he have to fill these bottles?

Other than these two reasons, of course, is the third reason, that his employer told him, "Here is a bunch of rum; get rid of it; shove it out to the public; I don't care how you do it."

He had 40 or 50 cases of rum, as his bookkeeper said.

"We have got to get rid of it anyway you can, whether it is put in with Schenley's or what not. Get rid of this rum."

That is the reason. And Mrs. Lewis testified he told her that he was going to tell his managers to get rid of that stuff, to push it, to get it out of the premises. Her testimony was very clear and distinct in that regard. She testified that he said, "I have got 40 or 50 cases here and I am going to move [235] it." He said, "I am going to give each one of my managers so much and ask them to press it in their sales."

He said, "I am going to get rid of this rum and brandy."

That is what she told you. "I am going to get rid of it," he says, "I am overstocked with it."

In other words, when he admits, "I am overstocked," that he can't sell it legitimately, doesn't he?

He says, "I have got too much of it; I can't sell it; so," he says, "I am going to try some new way of marketing this stock of rum."

Isn't that what he said in effect when he says, "I am overstocked; you have got to push it, get it out of the way?" He says, "I am going to try a new way to get rid of the goods."

So what did he do? He had his bartenders put it in whiskey bottles fifty-fifty with whiskey and sell it for whiskey.

Mrs. Lewis was a witness called by the Government. As I stated, she worked—as far as I know maybe she is still employed—I don't know whether she is or not at this time by Mr. Legatos,—she worked for him for five years. She testified on the stand that they were friendly. She had no reason to testify for or against him, apparently, from what she said on the stand, although the day before, as I indicated, she had talked to me about the case, and on the stand when Mr. Brannely asked her, "Does Mr. Legatos operate his business in [236] a lawful manner?" What was her answer? He either does or he doesn't. Yet, what did she do? Do you recall? I am sure we all recall. She sat in that chair for a minute, two minutes—sat there in my sight and your sight wondering what she was going to

say. It took her a long time to think that over, and finally she said, "Yes."

In other words, there were grave doubts in her mind, apparently. It took her a long time to come to that conclusion, and finally she came out with the answer, "Yes."

And then I asked her if she had talked to anyone about this case. She said, "Yes."

I said, "Since you talked to me?"

She said, "Yes."

I said, "Who?"

She said she talked to Mr. Brannely and Mr. Legatos, and, of course, what she talked about so far as Mr. Legatos is concerned I don't know, but at any event her testimony—and the jury is entitled to take the demeanor of a witness into consideration when they are testifying, so that you can weigh what she said, whether her answer be yes or no, and come to your own conclusion as to what she really thought when she was asked that question by Mr. Brannely.

We next had the witness for the defendant, his own witness, Mr. Chris Maritsas, and as I have stated earlier in my argument, he has stated that he did pour out this whiskey, [237] this brandy, rather, into a number of bottles—rum.

However, he, himself, is only there from 4:00 in the afternoon until 12:00 in the evening. He doesn't know whether or not the defendant Tony Legatos came in the morning and put rum out for them to put in the whiskey; take it out of the storeroom or whatnot.

However, the evidence is clear from Mrs. Lewis that this man Tony Legatos kept in close touch with his business. In his office he has an accountant, an auditor, if you will, besides her, and Mrs. Lewis testified herself that he knows from day to day for all practical purposes just what is being sold in these bars. And Mr. Legatos himself said that he goes into his bars very often and he testified that he, himself, kept in close touch with what was going on.

Now that is important from this standpoint, that if he did keep close tab of his business, as he so testifies, and had an auditor and bookkeeper, he would know just about what his sales of whiskey were per day. And do you think, ladies and gentlemen of this jury, that he wouldn't know when 31 bottles in one of his bars was being tampered with? Do you believe that Mr. Legatos would have no idea that they were pushing this rum in their whiskey? Is that reasonable for a man of his caliber, who has an accountant and auditor and is watching his business and going in and out of his bars?

And he talks about a number of other places, 16 or 17 [238] places, restaurants and what not. However, his office is in the Ochsner Building and he says, "I am here most of the time." He said, "I go out of town occasionally, but," he says, "most of the time I am here."

And he is how far from 612 K Street? A block and a half or so. Is it reasonable to suppose that man does not keep tab on that bar?

I believe that the government has proven facts and circumstances from which it is positively cer-

tain by circumstantial evidence for the most part that this man knew what was going on. However, we have from his own lips, from the lips of Mrs. Lewis, that he did have this rum and that he did instruct his managers to move it, and he, himself, conceded that on the stand today. We have the fact that the license is solely in Tony Legatos' name; we have the fact that no one else stood to profit one nickel; there were no partners in this deal whatsoever—he has some partners in other bars, but he, himself, owned this bar solely; he was the sole owner of that business. The other co-defendant had no interest in it.

Don't misunderstand me; I feel there is no question but that the other defendant did fill these bottles, but I feel and I know that Tony Legatos directed him to put this rum into these bottles and to sell it to the public and to sell it as what? To sell it as highballs. [239]

In other words, you come in and order, for instance, a Four Roses drink. The price varies on straight whiskies from Schenley's Black Label. What does he do? He reaches over and gets the Schenley's Black Label bottle and pours a little in the Four Roses bottle and serves it to you.

Of course, that isn't done before your eyes, ladies and gentlemen, that is done early in the morning or late at night, but that is what is done for all practical purposes in this case.

So far as the character witnesses are concerned, he has produced character witnesses, as any businessman might do. So far as Mr. Holmes and Mr.

Zollner knows, so far as I can ascertain, is that Mr. Legatos does his banking at the bank, and I assume that Mr. Zollner makes a little money—when he says he does business, I guess they lend him a little money, and I guess they don't want to hurt Mr. Legatos too much so far as he is concerned he is making a lot of money, I guess there is no question about that, and they have loaned him money, and they will lend him more money. That is what the testimony comes down to to me.

Mr. Holmes, however, said that if he knew what some of the facts and circumstances in this case were, he wouldn't know what his answer would be and he wouldn't say that his reputation as a law abiding citizen was good. However, none of them didn't say anything about his other reputation, outside of the law abiding portion of it. [240]

Summing up in brief—I don't want to bore you with this argument at this time—I don't know what to say as far as the defendant Chris Maritsas is concerned; to me he has admitted the offense; he said, "I filled the bottles," and the Court will instruct you, I am sure, that is against the law to do so, and there can be no question about that in your mind.

As far as the other defendant is concerned, I think the Court will instruct you that the offense charged in this indictment against Tony Legatos is one of that class in which it is not necessary to prove guilty intent.

In other words, I think the Court will instruct you that even though I hadn't produced Mrs. Lewis and even though I couldn't connect this defendant di-

rectly with the crime, that if he owned the bar—and he is the sole owner of that bar—he is licensed to carry on a business in this town, he is in a different position than the average businessman, he is licensed by the United States Government and by the State of California to carry on a lawful business, and when you are licensed to carry on a licensed business you owe a higher duty to the public generally. You are operating under a license and it is your duty to see that this business is carried on in a lawful manner.

I think the Court will instruct you that the defendant, being in the business of selling distilled spirits which have [241] been bottled while in bond, whether conducted by himself or his agents, was bound at his peril to see that there was no reuse of any bottle for the purpose of containing distilled spirits which had once been filled and stamped under the provisions of the act without removing and destroying the stamp previously fixed to such bottle. That if the bottles in question were refilled, they have been reused. I think the Court will so instruct you, and if one of the defendant's agents, acting within the scope of his employment, reused the bottle without removing and destroying the stamp, then the defendant's liability is the same as if he had reused it himself.

I think the Court will instruct you that is the law in this case.

However, in this case the Government has gone one step further: We have produced all the evidence that we could, which is very difficult in this type of case, to show you that as a matter of fact Tony

Legatos himself ordered the moving of the rum; we have shown you that this rum was put in whiskey bottles in a bar a block and a half away from his office; we have shown you that he was in this town and in and out of that bar time and time again; we have shown that this defendant kept very close tab on his business, knew what the sales were, and must have known, as a matter of fact, what was being poured in the drinks in his bar, and we have shown you that [242] the other defendant had absolutely no reason whatsoever to fill these bottles, unless he did so under the direction of the man who made the profit, Tony Legatos, in this case.

Thank you. [243]

CLOSING ARGUMENT ON BEHALF OF THE GOVERNMENT

Mr. Seawell: May it please the Court, counsel, ladies and gentlemen of the jury: I, of course, agree with Mr. Brannely in his closing remarks; no one wants to see an innocent person prosecuted, least of all myself, least of all the Grand Jury, and least of all this jury or the Court, and if we didn't believe that the man was guilty he would not be charged.

We have had investigations by agents and what-not, and the Government is convinced beyond a reasonable doubt, and that is all we are trying to do is present as clearly and impartially as we can that Tony Legatos is the man that made the profit from the pouring of the rum into the whiskey, although he had his agent do the pouring, and as far as I am personally concerned, if the jury sent this donkey

or this man Chris—I mean, found him guilty; what the penalty is is up to the Court—I feel that a great injustice would be done unless they also found the proprietor, the man who made the profit, the big shot, the rich man as Mr. Brannely would have you believe should not be prosecuted—he talks about corporations and whatnot; shouldn't they be prosecuted? Because a man is wealthy, should we dismiss him and simply pick on Chris? Is that the kind of justice that Mr. Brannely is asking that we bring before this Court and before this jury and before this [244] flag?

Our Constitution is based on the principle that every man should be treated equally, and this government still believes that, and this suggestion of Mr. Brannely's about wealthy and rich corporations should not influence this jury or should not influence this judge or influence this United States Attorney's office.

They talk about stamps being on these bottles. Of course the stamps were on there, but the violation of law is that they did not destroy the stamps and go buy a new stamp and then fill the bottle and then put the new stamp on the bottle.

Mr. Kennedy: Just a moment—pardon me——

Mr. Seawell: That is the violation of the law.

Mr. Kennedy: Pardon me.

Mr. Seawell: If they were going to refill them they would have to get a permit from the United States Government to refill those bottles.

Mr. Kennedy: Pardon me, Mr. Seawell, I have a right to be heard. That is not the law. I object to

the statement of counsel that it is the law that the defendants had to go and get a new stamp. They are only charged with not destroying the stamps affixed to the bottles. He isn't quoting the law at all——

Mr. Seawell: I am telling you what my understanding of the law is, and maybe someone else can explain it to you, that [245] before you may refill a bottle of whiskey you must have a permit from the United States Government, and you must have a stamp and attach it thereto after it is refilled.

Mr. Kennedy: Just a moment, I object to that. That is not a law, that is a misstatement of law, and I further object that it is not within the scope of the issues and entirely outside the scope of the issues, and I ask that the jury be asked to disregard the remarks of counsel.

The Court: Overruled.

Mr. Seawell: In this case there is no testimony that any new stamps were attached to these bottles. Mr. Kennedy is talking about revenue. That is where the revenue would be lost. So the fact that a new stamp was not attached after the new liquor was poured into the bottle—and it doesn't matter whether the tax was paid before or paid a dozen times, every time a bottle is filled the liquor that is put in there must have a stamp on it showing that the tax was paid.

Mr. Kennedy brings up the argument, he says it is all right to open a package of cigarettes, and you don't always destroy the stamp. I don't know whether that is the law or not. I never heard of that; I am a cigarette smoker; but I do know that in all

good conscience there would be something wrong if I took a package of Pall Malls or a package of Camels and tore the package open, but left all the stamp on and took out half of those Camels or took out half of the Pall Malls and put in a half a package of a 10c brand of [246] cigarettes, and sold them for Camels or Pall Malls. I know that is wrong myself. I don't have to be told that, and I think the ladies and gentlemen of the jury will understand that is wrong. It is the last step that makes that wrong, when you take out half of the package and put in a different product than is supposed to be there and tell the people here is a new package of Camel cigarettes when half of them are of an inferior brand of cigarettes.

There is the same thing again, is it not? There is the answer to the cigarette argument, I believe.

Mr. Brannely has discussed the law on this, and I would like to discuss, and I have read to you what the law is about the proof of guilt in this case.

It is only necessary to prove this defendant owns and operates the place in question. But we have gone further than that, and we have proven that he has not only given the orders to move this rum and not only given the orders, but the rum was actually found in his bottles and found in his premises. These bottles belong to Tony Legatos. They don't belong to anyone else, ladies and gentlemen. These bottles are his property solely and alone.

Mr. Brannely is talking about the Bill of Rights. The Bill of Rights gave us lots of rights, but there comes a time when there is a limit. There are cer-

tain rules and regulations in Government that must be passed for the protection of all, [247] and the Bill of Rights didn't say anything about it is legal to defraud the People of the United States.

This is an action by the United States for defrauding the United States, and the Bill of Rights didn't say that any one individual has a right to defraud the rest of the population.

Mr. Brannely is talking about Tony's denial. He says, "Why, as soon as Tony"—his inference was it was all one day—"As soon as Tony was told about it he immediately denied it." He said, "I had nothing to do with it."

Well, the fact of the matter is that the agents went to his place of business at 10:00 a.m. or thereabouts on the 18th day of July and they made an appointment to return one day later, some 26 hours later, and when they returned 26 hours later Tony made this denial that he is speaking about. And I imagine that some of his employees in the meantime had contacted him. I don't think that that was the first time that Tony ever knew what the charge was against him. I think he came down there at the request of Chris and he had had plenty of time to think this matter over and to think what he was going to say and who was going to take the rap when they walked in at 12:00 o'clock the next day.

And as far as going into his other bar is concerned on the same day, on the 18th, after they checked his bar, don't you believe that this bartender O'Leary notified the boss, notified Legatos that they had been in there and that they had [248] found what they

thought were refilled bottles—do you think they would find other bottles in his other place after that just a few steps up the street when they went there at 4:00 or 5:00 o'clock? They didn't know whether Legatos owned that or not as far as the record is concerned. They simply were checking all the bars in Sacramento, and there was no evidence that those bottles were not changed in the meantime, that they weren't all new bottles, if you want to go into that.

Mr. Brannely is talking about this reasonable doubt, and the Government wants you to try this case and give every consideration to the defendant, and if you are not satisfied, to bring in your verdict in accordance with your conscience with the evidence, but it is not incumbent upon the jury and it is not incumbent upon the Government in a prosecution to prove to a mathematical certainty, and the Court, I believe, will also instruct you about that, that we can only act as reasonable people, and in this type of cases we can only prove facts and circumstances, and from those facts and circumstances the jury may draw the conclusion as to what actually happened.

And in this case we proved the fact that Tony told him to move the stuff—and, by the way, Mr. Brannely read a part of that testimony, and then when he got to Page 34 he said, "I don't want to read that, that is unimportant," but that is where Tony said—this is what was left out:

"Tony said, 'I am going to get rid of this rum and brandy.' [249] He said, 'I am overstocked on it.' "

To me that is the important part of the testimony. He said, "I am going to get rid of this rum and brandy." And he said, "I am overstocked on it."

He couldn't sell it in highballs, so he pours it into whiskey bottles and sells it that way.

He talks about Mrs. Lewis, why did Mrs. Lewis—Mrs. Lewis came here in answer to subpoena from my office, and she says, "I was duty bound and Legatos was duty bound,"—I am not accusing Mr. Brannely, because I know he is a high type of attorney and I know he couldn't do anything wrong, and he was perfectly within his rights to talk to her—not only Mr. Brannely, but Mr. Legatos talked to her, but before Mr. Brannely talked to her I talked to her, and it wasn't apparently the same story she told me before when she took the stand.

I called that to your attention, when she paused for such a length of time. I think I wouldn't be competent to try a case if it didn't convey something to me. It conveyed something to me, it conveyed something to Mr. Brannely, he said, and it must have conveyed something to you, ladies and gentlemen, when she paused such a length of time before answering the question, if she knew the man conducted his business in a lawful manner.

If you are asked to say something against a person, you might think a long time before you answered to the contrary. [250]

So far as this excuse that they are offering that Mr. Legatos owns a number of businesses—he owns 16 or 17 bars, he can't watch all the bars at all times—well, that is as it may be, but when he took

the responsibility of operating these bars he took on the added duty of operating them in a lawful manner; and if that were not the law, ladies and gentlemen, we would be in a sad predicament.

If I could go out and buy 16 or 17 bars up and down the State in California and hire a manager and put him in there and let him sell water for whiskey and let him put in rum and put in brandy and what not into the whiskey and sell it as Scotch, and then when they go in and arrest my manager in Redding, "Why, no, I don't know anything about it. Gee, that is too bad, isn't it? That is too bad. We will just have to forget that. I wasn't in Redding. I don't know anything about it."

Or when they come to Sacramento about a block from my place of business and they arrest my manager selling rum, and they are selling caramel for Scotch whiskey and what not, I say, "Well, I am sorry, that is just too bad, but don't bother me about it, I am a busy man. I just made myself wealthy that way, but I don't want to be bothered about those triffls."

That, to me, is a ridiculous argument, and that is why the law is to the contrary and why, of course, it holds a man [251] responsible for his actions.

They bring some question into this case about the profit which was made. Well, it was obvious that he was overstocked, as they say, with rum. He wanted to get rid of that rum and he wanted to get rid of it just as soon as he could work it out through his bars, and whether he made a greater profit by selling that rum in Schenley bottles is immaterial

as far as I can see, and I think that is the most vicious type of argument I can think of to say that because a man is overstocked it is all right for him to sell his product under an assumed name and sell you rum when you think you are buying whiskey. I can't think of a weaker defense than that in all the time I have been practicing law.

I am not going to bore you any further. I think I have presented the Government's side of this case as fairly and impartially as I can, and I feel sincerely and I honestly believe that the man who really carried on this business of forcing these people to sell rum in whiskey bottles and pouring different types of liquor, caramel and what not into straight whiskey bottles, was the proprietor, and they have not advanced, and I have listened with interest to hear it, one reason why Chris would do that; not one reason have they advanced that would appeal to my reason in any way, and I don't believe they have given a reason why he would do it.

He had no reason. He had no interest in the place, and [252] that is why I say to you, ladies and gentlemen, that it must have been the proprietor that gave the instructions; that is why we have shown to you when Mrs. Lewis testified that Tony told her that Tony was going to order his bartenders to shove this stuff and get rid of it, and that is what he did.

I wish to thank you, ladies and gentlemen of the jury, for your attention, and I wish to thank the Court for its courtesies.

The Court: Ladies and gentlemen of the jury,

we will now adjourn until tomorrow morning at 10:00 o'clock. Remember the admonition heretofore given you by the Court.

DEFENDANT'S REQUESTED INSTRUCTIONS
REFUSED BY THE COURT

DEFENDANTS' PROPOSED INSTRUCTION
No. 2

Although the Indictment against the defendants charges violation of certain revenue laws and regulations, the matters for your determination do not have to do with whether or not taxes have been evaded by the defendants. These laws and regulations are designed to protect the revenue, and a charge that one or more of them has been violated does not mean that taxes have been evaded.

Covered in No. 1.

Refused—covered elsewhere.

MARTIN I. WELSH,

Judge. [254]

DEFENDANTS' PROPOSED INSTRUCTION
No. 3

You are instructed that under the first count of the indictment the defendants and each of them are charged with not the violation of a law, but of a regulation of the Bureau of Internal Revenue of the Treasury Department of the United States. These regulations are adopted pursuant to law and have the force and effect of law, but it is an essential ingredient of the violation of a regulation

that the defendants have knowledge of the regulation.

If you therefore find that the defendants or either of them had no knowledge of Section 175.41 of Regulation 13 issued by the United States Treasury Department, Bureau of Internal Revenue, you will find such defendant not guilty.

Constructive knowledge?

Not given.

Federal Register Act.

Not given.

MARTIN I. WELSH,
Judge. [255]

DEFENDANTS' PROPOSED INSTRUCTION
No. 4

Before either defendant may be found guilty under the First Count of the Indictment it is necessary that you find beyond all reasonable doubt that he "wilfully violated" the regulations involved. Wilfullness is made a vital ingredient of the crime by statute, and this means that the defendant must have had a knowledge and a purpose to do wrong.

May be implied?

Not given.

Title 26, Section 2871, U.S.C.

Potter v. United States 155 U. S. 438, 39 L.Ed. 214, 217, 15 Sup. Ct. 149.

People v. Armentrout 118 Cal. App. (Supp) 761, 773, 1 Pac (2d) 556.

Not given.

MARTIN I. WELSH,
Judge. [256]

DEFENDANTS' PROPOSED INSTRUCTION
No. 5

The law does not forbid mixing alcoholic beverages at a bar in advance of sales for consumption or in anticipation of sales for consumption, and if you find that one or both of the defendants mixed alcoholic liquors as charged in the first count of the indictment, but do not find as to such defendant or defendants that these liquors were not mixed in advance of sales or in anticipation of sales for consumption at the bar, it is your duty to return a verdict of not guilty.

Not given.

Regulations 20, Wholesale & Retail Dealers in Liquors, Article VII, Sec. 194.35.

Not given.

MARTIN I. WELSH,
Judge. [257]

DEFENDANTS' PROPOSED INSTRUCTION
No. 6

If you find that the defendant Chris Maritsas mixed or compounded alcoholic liquors in advance of sale for the purpose of filling for immediate consumption on the premises orders received at the bar or in expectation of the immediate receipt of such orders, you will find the defendant not guilty on the first count of the indictment.

No evidence.

Not given.

MARTIN I. WELSH,
Judge. [258]

DEFENDANTS' PROPOSED INSTRUCTION
No. 9

You are instructed that as to the defendant Tony Legatos neither the contents of any of the bottles introduced as exhibits in this case nor any information concerning the contents on these bottles presented to you by the prosecution is evidence against him; and in arriving at your verdict as to defendant Tony Legatos you are to disregard the contents of these bottles and all evidence concerning the condition of the contents of these bottles which was presented to you by witnesses for the government.

Why?

Not given.

MARTIN I. WELSH,
Judge. [259]

DEFENDANTS' PROPOSED INSTRUCTION
No. 10

You may not presume that other persons, even though they were employees, had authority to do a criminal act on behalf of either defendant; and if you find that some or all of the bottles described in the First Count of the Indictment were reused in violation of regulations, but do not find that both of the defendants personally reused the bottle or bottles, then as to each defendant who did personally not reuse any bottles unless you find beyond all reasonable doubt that he directly authorized or consented to the reuse in violation

of regulations, it is your duty to acquit him under the First Count of the Indictment.

Not given.

U. S. v. Grocery Bureau Conspiracy (D. C. of Calif. 1942) 43 Fed. Supp. 966, 971 princ.—does, act, or permits it to be done.

U. S. v. Corlin (D. C. of Calif., 1942, 44 Fed. Supp. 940.)

Not given.

MARTIN I. WELSH,
Judge. [260]

DEFENDANTS' PROPOSED INSTRUCTION No. 23

The regulations of the Secretary of the Treasury of the United States concerning traffic in containers of distilled spirits in effect at the time of the acts charged against defendants, contains the following regulation which governs the reuse of liquor bottles:

“§ 175.14 Reuse of containers. The reuse for packaging distilled spirits for sale at retail of liquor bottles or other authorized marked containers, as defined herein, is prohibited: Provided, That liquor bottles, as defined herein, used for packaging domestic distilled spirits may be reused (a) by the bottler whose permit number is blown therein, (b) by the parent company or wholly-owned subsidiary under the provisions of § 175.11, or (c) by the person acquiring stocks of liquor bottles in the possession of a permittee when any permit is suspended,

revoked, or surrendered, as authorized by § 175.39: Provided, further, That liquor bottles used for packaging imported distilled spirits may be exported for reuse under the provisions of § 175.27.

Sec. 175.14 Regulations of Bureau of Internal Revenue, Treasury Department.

No testimony.

Not given.

MARTIN I. WELSH,
Judge. [261]

Friday, April 12, 1946—10:00 o'clock a.m.

The Clerk: United States vs. Tony Legatos and Chris Andrew Maritsas.

Mr. Seawell: Ready.

Mr. Brannely: Ready.

Mr. Kennedy: Ready.

CHARGE OF THE COURT

The Court: Members of the jury, it is now my duty to instruct you on the law of this case, and it is your duty, as jurors, to follow the law as given to you in these instructions, and to apply the law thus given you to the facts in evidence before you.

It is the duty of the jury to give uniform consideration to all of the instructions herein given, and to consider the whole and every part thereof together, and to accept such instructions as a correct statement of the law involved.

On the other hand, I charge you that it is your exclusive province to determine the facts in the case and to consider the evidence for that purpose. You are the sole judges of the weight, effect and value of the evidence, and of the credibility of the witness.

The fact that an indictment has been filed against the [178] defendants is not to be considered by you as any evidence of the defendants' guilt. The indictment is merely a legal accusation charging a defendant with the commission of a crime; it is not, however, evidence against any such defendant, and does not create any presumption or inference of the defendants' guilt, and you are not to consider such fact in arriving at your verdict.

The defendants Chris Andrew Maritsas and Tony Legatos are charged with violation of Title 26, United States Code, Section 2871, in that on the 18th day of July, 1945, at a place known as "Golden Tavern", located at 621 K Street, in the City of Sacramento, County of Sacramento, State of California, within said Division and District, did wilfully, knowingly and unlawfully re-use liquor bottles, to-wit, a total of 31 bottles, as follows:

- 12 bottles of four-fifths quart capacity of whiskey, bearing the label of Schenley Reserve Blended Whiskey;
- 2 bottles of four-fifths quart capacity of whiskey, bearing the label of Schenley Reserve Blended Whiskey;
- 3 bottles of four-fifths quart capacity of whiskey,

bearing the label of Four Roses, A Blend of Straight Whiskies;

2 bottles of four-fifths quart capacity of whiskey, [179] bearing the label of Seagram's Seven Crown Blended Whiskey;

2 bottles of four-fifths quart capacity of whiskey, bearing the label of Lord Calvert Blended Whiskey;

2 bottles of four-fifths quart capacity of whiskey, bearing the label of Lord Calvert Blended Whiskey;

2 bottles of four-fifths quart capacity of whiskey, bearing the label of Old Forrester Straight Whiskey;

2 bottles of four-fifths quart capacity of whiskey bearing the label of Old Hermitage Straight Whiskey;

2 bottles of four-fifths quart capacity of whiskey, bearing the label of Seagram's V. O. Blended Whiskey;

2 bottles of four-fifths quart capacity of whiskey, bearing the label of Johnnie Walker Black Label Blended Whiskey,

in violation of the provisions of Section 175.41 of Regulation 13 prescribed by the Secretary of the Treasury in pursuance of the provisions of Title 26, United States Code, Section 2871.

The second count charges that at the time and

place described in the first count of the indictment the defendants did wilfully, knowingly and unlawfully place distilled spirits in 31 bottles which had been stamped and filled without destroying the stamp previously affixed to such bottles, said [180] bottles being listed and described in the foregoing first count of the indictment.

The laws under which the defendants are being prosecuted here are federal laws and are concerned with the conduct of bars, such as the premises where the alleged crimes were committed, only so far as is necessary to protect the revenue of the federal government.

The Court instructs you that it is incumbent upon the prosecution in connection with the second count contained in the indictment that the Government prove beyond a reasonable doubt and to a moral certainty that distilled spirits were placed in certain bottles and that the bottles in which said distilled spirits were placed had upon them revenue stamps which were not destroyed.

In other words, in connection with the second count in the indictment it is not only necessary that the Government prove that the defendants did wilfully and knowingly place distilled spirits in certain bottles, but the Government must further prove that the distilled spirits were placed in bottles without destroying the stamp previously affixed to such bottles. If the Government should fail to prove either one of these elements beyond a reasonable doubt and to a moral certainty, then it is your duty to return a verdict of not guilty on the second count.

You are instructed that whenever in his judgment such [181] action is necessary to protect the revenue, the Secretary of the Treasury is authorized, by the regulations prescribed by him, and permits issued thereunder if required by him (1) to regulate the size, branding, marking, sale, re-sale, possession, use, and re-use of containers (of a capacity of less than five wine gallons) designed or intended for use for the sale at retail of distilled spirits (within the meaning of such term as it is used in Section 2803) for other than industrial use, and (2) to require, of persons manufacturing, dealing in, or using any such containers, the submission to such inspection, the keeping of such records, and the filing of such reports as may be deemed by him reasonably necessary in connection therewith. Whoever wilfully violates the provisions of any regulation prescribed, or the terms or conditions of any permit issued, pursuant to the authorization contained in this section, and any officer, director, or agent of any corporation who knowingly participates in such violation, shall, upon conviction, be punished as prescribed by law.

You are instructed that the first count of the indictment in this case charges the defendant Chris Maritsas with wilfully, knowingly and unlawfully reusing certain liquor bottles.

If you find that the defendant Chris Maritsas did not wilfully, knowingly and/or unlawfully reuse certain liquor bottles, then it is your duty to return a verdict of not [182] guilty as to the defendant Chris Maritsas.

You are instructed that the first count of the indictment in this case charges the defendant Tony Legatos with wilfully, knowingly and unlawfully reusing certain liquor bottles.

If you find that the defendant Tony Legatos did not wilfully, knowingly and/or unlawfully reuse certain liquor bottles, then it is your duty to return a verdict of not guilty as to the defendant Tony Legatos.

Each defendant is presumed to be innocent of the crime charged against him. This presumption of innocence attaches at the beginning of the trial. It has the weight and effect of evidence in each defendant's behalf, and continues to operate in each defendant's favor throughout all the stages of the trial. When you finally retire to the jury room to deliberate upon a verdict, it becomes your duty to consider the evidence introduced in the light of this resumption. This resumption is sufficient to acquit any defendant charged with a crime unless it is overcome by evidence that satisfies your mind to a moral certainty and beyond a reasonable doubt of the guilt of the accused, and unless you, and each of you, are so satisfied, it is your duty to find the defendant not guilty.

It is not necessary for each defendant to prove his innocence; the burden rests upon the prosecution to establish [183] every element of the crime with which a defendant is charged to a moral certainty and beyond a reasonable doubt.

The Court instructs you that under the law no

jury should, nor has it the right, to convict a defendant of a crime upon mere suspicion, however strong, nor simply because there may be a preponderance of all of the evidence in the case against him, nor merely because there is or may be a strong reason to suspect that he is guilty; but before a jury can lawfully convict they must be convinced of the defendant's guilt beyond all reasonable doubt.

A reasonable doubt is a doubt resting upon the judgment and reason of him who conscientiously entertains it from the evidence in the case. It is a doubt based upon reason. By such a doubt is not meant every possible or fanciful conjecture that may be suggested or imagined, but a fair doubt based on reason and common sense, and growing out of the testimony in the case. A reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence in the case, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection [184] with and as accompanying all the instructions that are given to you.

The jury are further instructed that mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the evidence supports the allegation

of the indictment, nor is it sufficient upon the doctrine of chances that it is more probable that the defendants are guilty than that they are innocent, to warrant conviction. The defendants must be proven to be guilty so clearly and conclusively that there is no reasonable theory upon which they can be innocent, when all of the evidence is considered together. If anyone, or any number of you, after considering and deliberating upon all the evidence in the case, shall be of the opinion that the defendants have not been proven guilty to a moral certainty and beyond a reasonable doubt, those entertaining that opinion should vote in favor of a verdict of "not guilty," and should so adhere to that opinion until convinced to a moral certainty and beyond a reasonable doubt that they are wrong; and if the jury entertain any reasonable doubt upon any single fact or element necessary to constitute the crime charged, it is your duty to give to the defendants the benefit of such doubt by an acquittal, and return a verdict of "not guilty."

If any facts or circumstances in this case can by any reasonable construction be explained or construed consistently [185] with the innocence of the defendants, it is your duty so to construe them, and if the facts and circumstances and evidence in this case can reasonably be construed as establishing the innocence of the defendants, it is your duty to so construe them and acquit the defendants.

Your are further instructed that if from the facts offered in this case the jury finds that they may draw two equally reasonable conclusions, one of

which points to the guilt of the defendants and the other points to the innocence of the defendants, it is the duty of the jury to adopt that conclusion which is consistent with the innocence of the defendants, and to find them accordingly not guilty. In other words, if you find that the evidence in this case is susceptible to two explanations, one of which would lead you to a verdict of not guilty, and the other of which would lead you to a verdict of guilty, it is your duty under the law to adopt that explanation which would cause you to return a verdict of not guilty.

Every witness is presumed to speak the truth. This rule applies to the testimony of the defendant if he takes the stand in his own behalf as well as to that of any other witness. You are instructed that his testimony is not to be disregarded or discredited or entitled to less weight for the reason that he is the defendant and stands charged of a criminal offense. He is entitled to the same privileges [186] and his testimony is to be weighed by you with the same care and by the same rules as that of any other witness.

You are instructed that Regulation 11 of the U. S. Treasury Department, Bureau of Internal Revenue, relating to bottling of tax paid distilled spirits, Section 189.108, at the time the offense herein alleged was alleged to have been committed read as follows: "The stamp may be affixed over a cup or cap placed over the opening of the bottle, provided the arrangement is such that the stamp will be torn apart or destroyed when the cup or cap is unscrewed or

removed or destroyed. Where it is desired to affix the stamp over a removable cup or cap, the cup or cap must be securely screwed or fastened over the opening of the bottle, and must be of such size or construction that the stamp will pass over the bottle and extend beyond the cup or cap for such length that each end of the stamp may be securely affixed to the surface of the bottle. Any bottler using such a cup or cap must see to it that the stamp is securely affixed, with a strong adhesive, to both the cup or cap and the bottle in such a manner that the stamp will be torn apart when the cup or cap is unscrewed or removed. Where it is desired to affix the stamp over a cup or seal made of cellulose or other similar adhesive material which is so shrunk or otherwise fitted over the neck of the bottle as to be removable without being destroyed, it will not be necessary for the ends of the [187] stamp to be affixed to the surface of the bottle, but the cap or seal and stamp must be so affixed that a portion of each will remain attached to the bottle when it is opened . . .”

In order that a verdict of guilty be found against either of the defendants under the Second Count of the Indictment it is necessary that you find beyond all reasonable doubt that the defendant did place distilled spirits in the bottles, and further find beyond all reasonable doubt that the stamps affixed to these bottles had not been torn apart by removing the caps or stoppers from these bottles or otherwise destroyed at the time this defendant placed distilled spirits in the bottles. If you do not so find on

both of these points, it is your duty to acquit such defendant on the second count.

If you find that the bottles, and each of them, alleged in count 2 of the indictment not to have the stamps destroyed thereon, were of the kind and character as required by Section 189.108 of Regulations 11, and that upon removal of the cup or cap over the opening of the bottle the stamp was torn apart or destroyed and the cup or cap in each instance was removed and the stamps, and each of them, were destroyed, you will find the defendants not guilty on the second count of the indictment.

The Court instructs you that a stamp upon a bottle of distilled spirits, such as those upon the whiskey bottles [188] involved in this case, is destroyed within the meaning of the law when it is torn apart by removing the cap or stopper from the bottle.

You are instructed that no person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits.

You are instructed that no material or substance of any kind other than pure water may be added to distilled spirits during the process of bottling in bond, nor may any substance or material be subtracted from the spirits.

You are instructed that it is unlawful to add or subtract any substance or material to any straight whiskey which will alter or change in any way

whatsoever the condition or character of the product.

You are instructed that no liquor bottle or other authorized container shall be re-used for the packaging of distilled spirits except as provided in section 175.14, nor shall the original contents, or any portion of such original contents, remaining in a liquor bottle or other authorized container be increased by the addition of any substance. The exception permitted by Section 175.14 does not apply to this case.

The good character of the defendant, when proven, is [189] itself a fact in the case; it is a circumstance tending in a greater or less degree to establish his innocence, and it is not to be put aside by the jury, in order to ascertain if the other facts and circumstances considered by themselves do not establish his guilt beyond a reasonable doubt.

The Court instructs the jury that good character itself may, in connection with all the evidence, create a reasonable doubt and entitle the defendant to an acquittal.

You are instructed that one who has been personally acquainted with the defendant for a considerable length of time, and who has been in a position where he probably would have heard his reputation talked about, were it a subject of comment, and who has never heard it questioned, is a competent witness to testify to the good character of such person; and the fact that a witness has never heard anything against his character is the most cogent evidence of his good character and reputation, because a man's character does not get

talked about until there is some fault to be found with him. It is the best evidence of his good character that he is not talked about at all.

I charge you that your verdict must be found from the evidence received by this court at this trial alone, and if you have heard rumor or any talk or by chance have read anything in any of the papers concerning this case, during the trial, or if any matters have been referred to or stated during the trial of the case, by counsel, or by witnesses, which matters [190] or testimony was stricken out by the court, I charge you that all such rumor, matters, and testimony should be entirely disregarded by you, and your verdict be based on the testimony in the case received by the court and the law as given you by the Court.

The Court cautions you to distinguish carefully between the facts testified to by the witnesses and the statements made by the attorneys in their arguments, or presentations as to what facts have been or are to be proved. And if there is a variance between the two, you must, in arriving at your verdict—to the extent that there is such variance—consider only the facts testified to by the witnesses; and you are to remember that statements of counsel in their arguments or presentations are not evidence in the case. If counsel, upon either side, have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are.

On the other hand, if counsel have stipulated or

agreed to certain facts, you are to regard the facts so stipulated and agreed to by counsel, as being conclusively proven.

In determining what your verdict shall be, you are to consider only the evidence before you. Therefore, any testimony as to which an objection was sustained by the Court, and any testimony which was ordered stricken out by me, must be [191] wholly left out of account and disregarded.

If you should find that there are discrepancies or inconsistencies existing in the testimony of any witness, or between the testimony of any witnesses, or if you should find yourselves disagreeing over various issues, real or apparent, you should then ascertain whether or not such discrepancies or inconsistencies, or such points of difference affect the true issues in this case. Examine such discrepancies or inconsistencies and such disputed points, and ask yourselves these questions: How does the decision of this, or that, or the other discrepancy or matter in dispute, affect the guilt or innocence of the defendant? Regardless of what may be the truth concerning such discrepancies or inconsistencies, ask yourselves the main question—did or did not the defendant commit the charges as alleged in the indictment? Is such discrepancy or such disputed point material to establish the main and material issue of fact as to the guilt or innocence of the defendant? If they are not material, if the decision of the same is not necessary to enable you to arrive at the truth of the guilt or innocence of the defendant, then such discrepancies or disputed points are

immaterial and minor matters, and you should waste no further time in discussing or considering them.

Each of the parties in this case is entitled to the independent judgment of each juror. The law requires that [192] before a verdict of conviction or acquittal can be rendered, each juror must concur therein. If, therefore, any one, or number of you, after deliberating on the evidence in this case, shall be of the opinion that there is a reasonable doubt as to the guilt of the defendant, those entertaining this opinion should vote in favor of not guilty, and should adhere to such opinion until convinced beyond a reasonable doubt that the defendant is guilty, then it would be your duty to return a verdict of guilty herein.

While, of course, you are to give the matter your individual consideration, and your verdict must express your individual judgment, it is your duty carefully and candidly to consider the reasons and arguments of your fellow jurors, and if, after such consideration, you entertain a reasonable doubt as to the guilt of the defendant, you should vote for acquittal. But if you are convinced beyond a reasonable doubt that the defendant is guilty, then it will be your duty to render a verdict of guilty accordingly. The Court expects you to consider this case fairly and impartially, and to discuss your view frankly with your fellow jurors.

In every crime, there must exist a union or joint operation of act and intent, and for a conviction, both elements must be proven to a moral certainty

and beyond a reasonable doubt. Such intent is merely the purpose or willingness to commit such act. It does not require a [193] knowledge that such act is a violation of law.

However, a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts.

You are instructed that the offense charged in this indictment as against Tony Legatos is of that class in which it is not necessary to prove guilty intent. This defendant, being engaged in the business of selling distilled spirits which had been bottled while in bond, whether he conducted it by himself or his agent, was bound at his peril to see that there was no re-use of any bottle for the purpose of containing distilled spirits, which had once been filled and stamped under the provisions of the Act in question, without removing and destroying the stamp previously affixed to such bottle. If the bottles in question were refilled, they have been re-used—if the bottles in question were refilled, they have been re-used. Agents of the defendant Tony Legatos, if one of them acting—I will go over this again.

If the bottles in question were refilled, they have been re-used. If one of the agents of the defendant Tony Legatos, acting within the scope of his employment, re-used the bottle without removing and destroying the stamp, then this defendant's liability is the same as if he had re-used it himself. [194]

A witness may be impeached by the party against

whom he was called, by contradictory evidence; by evidence that he or she had made at other times statements inconsistent with his or her present testimony.

If you believe that any witness has been impeached, then you will give the testimony of such witness such credibility, if any, as you may think it entitled to.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury have a right to distrust such witness' testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony, except insofar as he has been corroborated by other credible evidence or by facts and circumstances proved on the trial.

The jury are the sole judges of the credibility of the witnesses, and the weight to which their testimony is entitled. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which the witness testifies, by the character of such testimony, or by contradictory evidence. You should carefully scrutinize the testimony given, and in so doing, consider all of the circumstances under which any witness has testified, his or her demeanor, his or her manner while on the stand, his or her intelligence, the relation which he or she bears to the Government or to the defendants, the manner in which the witness might be affected by the verdict and the extent to [195] which he or she is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his or her credibility.

If you find that the presumption of truthfulness attaching to the testimony of any witness has been repelled, then you will give the testimony of such witness such credibility, if any, as you may think it entitled to.

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony by an eye witness to the commission of the crime; and the other is proof in evidence of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendants and which is known as circumstantial evidence.

The law in regard to circumstantial evidence is this:

In order to justify a jury in finding a verdict of guilty based on circumstantial evidence, the facts and circumstances must not only be consistent with each other and with the guilt of the defendants, but they must be inconsistent with any reasonable theory of the defendants' innocence that can be predicated on the evidence and must show the defendants' guilt beyond a reasonable doubt.

In other words, not only must each fact relied upon to show guilt be proved beyond a reasonable doubt, but such fact must be consistent with all the other facts introduced [196] in the chain of circumstances, and must further be inconsistent with any other rational conclusion than that of the guilt of the defendant.

It is your duty as jurors to try this case as to the

facts, upon the evidence introduced at the trial; and upon the law as given you by the Court in these instructions. The Court, however, has not attempted to embody all the law applicable to the case in any one of these instructions, but in considering any one instruction, you must construe it in the light of and in harmony with every other instruction given, and so considering and so construing, apply the principles in it enunciated to all the evidence admitted upon the trial.

The indictment contains two counts against two defendants.

Each count must be considered by you as a separate and several charge against each defendant and each defendant is entitled to have each count against him in the indictment considered separately and severally from the charge or charges against the other defendant, and, according to such view as you may take of the evidence, you shall return a verdict of either guilty or not guilty on each count as to each defendant.

Your verdict in each instance must be unanimous.

When you retire to your jury room to deliberate, you will select one of your number as foreman and he will sign your verdict for you, whereupon you will return into court [197] with the same. Your foreman will represent you as your spokesman in the further conduct of this case in this court.

The Clerk will hand you the form of verdict.

Any exceptions?

Mr. Seawell: None for the Government.

Mr. Kennedy: Yes, your Honor.

The Clerk: Excuse the jury to the witness room while he makes his exceptions.

Members of the jury, will you please go to the witness room? The Marshal will take you there until we call for you.

(Thereupon the jury retired from the court room.)

The Clerk: All right, Mr. Kennedy, you may make your exceptions.

Mr. Kennedy: Your Honor, at this time we take—make the following objections to the Court's failure to give the defendants' proposed instruction number 4, which was, "Before either defendant may be found guilty under the first count in the indictment, it is necessary that you find beyond all reasonable doubt that he wilfully violated the regulations involved. Wilfulness is made a vital ingredient of the crime by statute, and this means that the defendant must have had a knowledge and purpose to do wrong."

We also take exception to the Court's failure to give the defendants' proposed instruction number 3 which sets out the portion of the regulations, Section 175.14 of Regulation [198] 13, which contains the exceptions to 175.41.

In connection with the instructions given by the Court, an exception is made, and the following objections are pointed out to this instruction:

"You are instructed that no person shall transport, possess, buy, sell, or transfer any distilled spirits unless the immediate container thereof has affixed thereto a stamp denoting the quantity of the

distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits."

The exception that is taken upon such instruction and the objection made is that the section contains the following exceptions which have not been enunciated by the Court to the jury, the provisions of subdivision 1, which excepts distilled spirits placed in a container for immediate consumption on the premises or for preparation for such consumption, and subdivision number 3 excepts from the operation of the section distilled spirits placed in containers required to be stamped under existing law.

Exception is taken to the giving of Regulation 188.57 relating to the additions or—prohibited additions of substances of any kind that may be added to distilled spirits during the process of bottling in bond. To the particular instruction the objections are made that Regulation 6 is a regulation controlling distillers, and, precisely, that the [199] provisions of Section 2871, under which the defendants are being charged in the first count, require that the regulation be passed under Section 2871, and the only regulations passed by the Secretary of Treasury or the Alcohol Tax Unit under 2871, the bottling regulations are those which are contained in Regulation number 13; that regulation 6, more specifically Section 188.57 of Regulation 6, was not passed under 2871, and does not relate to the offense in question.

The same objection is made to the instruction given by the Court that it is unlawful to add or sub-

tract any substance or material to any straight whiskey which will alter or change in any way whatsoever the condition or character of the product. This was not a regulation that was passed under the provisions of Section 2871; the only regulation passed under Section 2871 are Regulations number 13, which are complete in and of themselves, and this particular section number 22 of regulation 5 does not apply to the offense in question.

To the instruction given relative to the provisions of Regulation 175.41 of Regulation 13, the exception is made that the instruction as to the exceptions contained in 175.14 were proposed and not given.

The Court: These are motions that you are making?

Mr. Kennedy: Pardon me?

The Court: These are motions that you are making? [200]

Mr. Kennedy: Yes, your Honor. The rules state that the objections shall be made to the Court prior to the time the jury retires, and it is under the provisions of Rule 30 that these objections are made.

May I have just a second to check our proposed instructions, your Honor?

The Court: Motions denied.

Mr. Kennedy: Pardon me?

The Court: I say, motions denied.

Mr. Kennedy: Mr. Brannely desires to join in that motion.

Mr. Brannely: Your Honor, in order to save the time of the Court, without reiterating the exceptions stated by Mr. Kennedy, on behalf of the defendant

Tony Legatos we adopt the same exceptions made by him, and in addition to that we take exception to the instruction in which the jury was instructed that the offense charged in his indictment as against Tony Legatos is of that class in which it is not necessary to prove guilty intent. The defendant being in the business of selling distilled spirits which had been bottled while in bond, whether he conducted it by himself or his agents, was bound at his peril to see that there was no re-use of any bottle for the purpose of containing distilled spirits which had once been filled and stamped under the provisions of the act in question without removing and [201] destroying the stamp previously affixed to such bottle.

If the bottles in question were refilled, they have been re-used. If one of the agents of the defendant, Tony Legatos, acting within the scope of his employment, re-used the bottle without removing and destroying the stamp, then this defendant's liability is the same as if he had re-used it himself.

And to that instruction, in addition to those made by Mr. Kennedy, your Honor, we take exception.

The Court: Denied.

(Thereupon, at 10:46 o'clock a.m. the jury returned to the court room and retired to the jury room to deliberate upon their verdict.)

(The jury returned into the court room at 2:10 o'clock p.m., whereupon the following proceedings were had:)

The Court: Call the roll of jurors, Mr. Clerk.

(Roll called.)

The Clerk: They are all present.

The Court: Ladies and gentlemen of the jury, I have from Mr. Sellers, the foreman, the following, quote:

"Judge Welsh: Your instruction to the jury with reference to the responsibility of an employer for the acts of employee is not clear to all of the jurors.

"Respectfully, N. M. Sellers, Foreman."

My answer is this, from instruction number 6:

"You are instructed that the offense charged in this indictment as against Tony Legatos is of that class in which it is not necessary to prove guilty intent. This defendant being engaged in the business of selling distilled spirits, which had been bottled while in bond, whether he conducted it by himself or his agents, was bound at his peril to see that there is no re-use of any bottle for the purpose of containing distilled spirits which had once been filled and stamped under the provisions of the Act in question without removing and destroying the stamps previously affixed to such bottles. If the bottles in question were refilled, they have been re-used. If one of the agents of the defendant, Tony Legatos, acting within the scope of his employment, re-used the bottle without removing and destroying the stamp, then this defendant's liability is the same as if he had re-used it himself."

You may now retire.

(Thereupon the Jury retired at 2:15 o'clock p.m., and returned into Court at 4:55 o'clock

p.m., at which time the following proceedings were had:)

The Court: Call the roll of jurors.

(Roll called.)

The Clerk: They are all present, sir. [203]

The Court: There was presented to me the following:

“Judge Welsh: We previously asked you can an employer be held responsible for the acts of an employee. Your answer was that an employer can be held responsible for the acts of an employee. We now wish to ask is an employer responsible for the acts of an employee, even if the employee violates the law against the knowledge and consent of the employer?”

“Respectfully, N. M. Sellers, Foreman.”

Mr. Foreman, will you please state numerically, without divulging which way either for conviction or acquittal, how you now stand?

Juror Sellers: We stand eleven to one, your Honor.

The Court: The answer is this:

You are instructed that the offense charged in this indictment as against Tony Legatos is of that class in which it is not necessary to prove guilty intent. This defendant being engaged in the business of selling distilled spirits which had been bottled while in bond, whether he conducted it by himself or his agents, was bound at his peril to see that there was no re-use of any bottle for the purpose of containing distilled spirits which had once been filled and stamped under the provisions of the

Act in question without removing and destroying the stamp previously affixed to such bottle. [204]

If the bottles in question were refilled, they have been re-used. If one of the agents of defendant Tony Legatos, acting within the scope of his employment, re-used the bottle without removing and destroying the stamp, then this defendant's liability is the same as if he had re-used it himself.

Mr. Brannely: Your Honor, at this time——

Mr. Seawell: Just a moment. Any motion?

The Court: Denied. You may now retire.

(The jury commenced to retire from the court room.)

Mr. Brannely: Your Honor——

Mr. Seawell: Just a moment——

The Court: Wait a minute. Do you understand?

(The jury retired from the court room.)

The Court: Now, what do you wish to say?

Mr. Brannely: I believe, your Honor, under the new rules of procedure here, that before the jury retires we are to state our objection or our exception to the instruction of law that your Honor has just read the jury, and in that connection there is another instruction which would answer the identical question that the jury has asked, your Honor, which is Instruction Number 8, which has been read to the jury, which is defendant Tony Legato's Instruction number 8, and that also would answer the identical question that was asked by the Jury, and I want to call the Court's attention to that so that the Court

could also instruct the jury in connection with the language of that instruction. [205]

Mr. Seawell: Of course, that section refers to the situation as this morning after the instructions were given by the Court, the jury retired and you then made your exceptions, and the Court overruled them. The jury has asked for an instruction to be repeated, which the Court has done. There is nothing wrong with that procedure.

Mr. Brannely: I am proceeding under Section 30 of the new rules, which provide that "No party may assign as error any portion of the charge or omission therefrom, unless he objects thereto before the jury retires."

Mr. Seawell: That is right, when the jury retires originally. This jury retired at 10:45 this morning.

Mr. Kennedy: I would like to add to that that the new rules provide that the defendant has a right to—that if the defendant has any exceptions to any instructions, that the defendant has a right to be heard by the Court, and if he has any additional instructions that he desires to propose, and there are additional instructions given by the Court—for instance, the instruction on intent—that Act and intent is an essential part—as I interpret the question asked by the Jury, is an essential part of the instructions to the jury, and I think in all fairness to the defendants that the instructions should be reread to the jury which were read this morning in the way of our instructions in connection with intent, and particularly the instruction that the

jury [206] must find intent before the defendants can be convicted.

Mr. Seawell: Of course, if your Honor follows that to the logical conclusion, we would try this case all over again.

The Court instructed the jury this morning at quarter to eleven, and they took their exceptions, and then the jury came back and asked for the instruction which your Honor gave them, and I think that is all there is to it, unless we are to try this case again at this point.

The Court: Let it stand as it is.

Recess to await the verdict of the jury.

(Recess.)

(The jury returned into the court room at 5:10 o'clock P.M., whereupon the following proceedings were had:)

The Court: The clerk will call the roll of jurors.

(Roll called.)

The Clerk: They are all present, sir.

The Court: Have you agreed upon a verdict, Mr. Foreman?

Juror Sellers: We have, your Honor.

The Court: Please pass it to the Marshal.

(The verdict was handed to the Marshal, who handed it to the Court.)

The Court: Record the verdict.

The Clerk: Ladies and gentlemen of the jury, harken to your verdict as it stands recorded: [207]

"We, the jury, find as to the defendants at the

bar as follows: Chris Andrew Maritsas, guilty on the first count, not guilty on the second count; Tony Legatos, guilty on the first count, not guilty on the second count.

“N. M. Sellers, Foreman.”

So say you all, ladies and gentlemen?

Jurors: Yes.

Mr. Brannely: We would like to have the jury polled, your Honor.

(The jury was polled, all answering it was their verdict.)

I hereby certify that the foregoing 208 pages comprise a full, true and correct transcript of the testimony and proceedings in the case of United States of America, Plaintiff, vs. Tony Legatos and Chris Andrew Maritsas, Defendants, number 9522, on April 9th, 10th, 11th and 12th, 1946.

Dated Sacramento, California, this 22nd day of April, 1946.

/s/ CLARENCE F. WIGHT,

U. S. District Court Reporter.

[Endorsed]: May 15, 1946. [208]

Wednesday, April 17, 1946

2:00 o'clock p.m.

PROCEEDINGS AT TIME OF JUDGMENT

(The defendant, Tony Legatos, was in court, represented by his attorney, John L. Brannely, Esq.)

(The defendant, Chris Andrew Maritsas, was present in court, represented by his attorney, Anthony J. Kennedy, Esq.

(The Government was represented by Emmet J. Seawell, Esq., Assistant United States Attorney.)

The Clerk: United States vs. Tony Legatos and Chris Andrew Maritsas.

The Court: Tony Legatos, are you ready for judgment and sentence?

Mr. Brannely: Yes, your Honor.

The Defendant: Yes.

The Court: Do you wish to say anything to the Court before the Court pronounces judgment and sentence on you?

The jury having found you guilty on the first count of the indictment it is the judgment and sentence of the Court that you, Tony Legatos, be imprisoned in the Federal Penitentiary for a period of two years, and that you pay a fine to the United States of America in the sum of \$1,000, and if such fine is not paid it is ordered that you be imprisoned until such fine is paid or until you are otherwise discharged [262] as provided by law.

Chris Andrew Maritsas, are you ready for judgment and sentence?

Do you wish to say anything to the Court—Do you speak English?

Mr. Seawell: Do you wish to say anything to the Court?

The Defendant Maritsas: No.

The Court: The jury having found you guilty on the first count of the indictment, it is the judg-

ment and sentence of the Court that you, Chris Andrew Maritsas, be placed on probation for a period of three years and that you pay a fine to the United States of America in the sum of \$500. If such fine is not paid it is ordered that you be imprisoned until the payment of such fine or until you are discharged as provided by law. Remanded.

Mr. Brannely: Your Honor, may I make a statement on a motion to reconsider the judgment on behalf of the defendant Tony Legatos at this time?

The Court: Denied.

Mr. Brannely: Well, may I make a statement to your Honor, please, in connection with it?

This defendant, Tony Legatos, your Honor, has never before been in any difficulty whatsoever, and your Honor appreciates under the evidence here with the way the jury was instructed it could not have been any act of Tony [263] Legatos in connection with this.

The extreme penalty, your Honor, is being meted out to a man here that I sincerely think had absolutely nothing to do with the offense itself. Would your Honor reconsider that and make it a two-year probationary period instead of a two-year penitentiary sentence?

There have been many, many cases of this nature in the State of California and in each case one of them a fine has been assessed——

Mr. Seawell: That is not true, Mr. Brannely. In San Francisco they have sentenced many men—several to jail.

Mr. Brannely: But I want to say this: No em-

ployer where the question of intent has been raised has ever come to my knowledge where he has served a term in the penitentiary for this offense.

Your Honor, I believe in fairness to the defendant and as a matter of justice that the defendant, Tony Legatos, could be placed on probation for those two years instead of the sentence to the Federal penitentiary. Your Honor, I think the penalty is very, very harsh in connection with that and I ask your Honor to reconsider that so that justice will be done in this matter.

The Court: Denied.

Mr. Kennedy: Your Honor, at this time I believe the [264] rules contemplate on the taking of appeal where the defendant elects not to serve the sentence that the defendant shall be admitted to bail. I don't think it can be denied in this case that Tony Legatos, insofar as the instruction was concerned, has a substantial question of law, and an appeal is to be filed this afternoon. For the purpose of conserving the time of the Court, may we now make an oral motion for bail?

The Court: Denied.

Mr. Kennedy: Am I led, your Honor, to reason from that that if bail is applied for later it will be denied?

The Court: Denied, yes.[265]

I hereby certify that the foregoing pages, numbered from 209 to 265, comprise a full, true and correct transcript of the proceedings had on the Motion to Suppress, the opening and closing ar-

guments of the Government, Defendants' requested instructions refused by the Court and the proceedings at time of judgment in the case of United States of America, Plaintiff, vs. Tony Legatos, No. 9522.

/s/ CLARENCE F. WIGHT,

Official Reporter, U. S. Dist.
Court.

Dated: May 13, 1946.

[Endorsed]: Filed May 15, 1946. [266]

[Endorsed]: No. 11307. United States Circuit Court of Appeals for the Ninth Circuit. Tony Legatos, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed May 17, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals,
Ninth Circuit

No. 11307

TONY LEGATOS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON
APPEAL.

Appellant, Tony Legatos, proposes on his appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled action, to rely on the following points as error:

1. The court erred in denying the motion to quash the first count of the indictment.
2. The court erred in denying defendant's motion to suppress evidence and return property.
3. The court erred in admitting over objection, testimony based on an unlawful search and seizure.
4. The court erred in admitting into evidence over objection, bottles and the contents thereof, obtained through unlawful search and seizure.
6. The court erred in admitting into evidence without proper foundation, over objection, bottles and their contents.

6. The court erred in admitting, over objection, testimony as to the statement of a co-defendant prior to the establishment of the corpus delicti.

7. The court erred in admitting over objection, hearsay testimony and opinion evidence of the Government witness, Laverne Lewis, and in allowing the Government attorney to cross-examine such witness.

8. The court erred in denying defendant's motion for judgment of acquittal at the close of the Government's case.

9. The court erred in denying defendant's motion for judgment of acquittal at the close of the taking of testimony in the case.

10. The court erred in instructing the jury:

(a) By giving inconsistent instructions;

(b) By instructing the jury that Section 2871 of the Internal Revenue Code required no intent to constitute a violation;

(c) By instructing the jury that irrespective of the lack of knowledge of defendant as an employer the defendant could be held criminally liable for the acts of his employee;

(d) By instructing the jury on Treasury Department Regulations, namely, Section 188.57 of Regulation 6, and Section 22 of Regulation 5.

11. The court erred in refusing to instruct the jury:

(a) That the jury, in order to find the defendant guilty under the first count, must find that the

defendant wilfully violated Section 175.41 of Regulation 13;

(b) That the contents of bottles introduced into evidence were not evidence against the defendant;

(c) That an employer was not criminally responsible for the acts of his employee unless the employer authorizes such acts.

12. The court erred in denying defendant's motion for a new trial or in the alternative a judgment of acquittal.

The foregoing statement of points to be relied upon on appeal does not designate the parts of the typewritten record appellant thinks necessary for the consideration of such points, for the reason that the entire record is being printed and the specification of error and the briefs to be subsequently filed in the above-entitled appeal will show by reference to the printed record the portions thereof necessary for consideration of the foregoing points.

/s/ JOHN L. BRANNELLY.

/s/ ERNEST TORREGANO.

/s/ ANTHONY J. KENNEDY.

Attorneys for Appellant.

Due service of a copy of the foregoing is hereby admitted this 23rd day of May, 1946.

FRANK J. HENNESSY,

U. S. Attorney.

By /s/ EMMET J. SEWELL, by Dfs.

Assistant U. S. Attorney.

[Endorsed]: Filed May 28, 1946. Paul P. O'Brien, Clerk.

At a Stated Term, to wit: The October Term, 1945, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and forty-six.

Present: Honorable Clifton Mathews, Circuit Judge, Presiding. Honorable William Healy, Circuit Judge. Honorable Wm. E. Orr, Circuit Judge.

[Title of Cause.]

ORDER GRANTING MOTION OF APPELLANT FOR ADMISSION TO BAIL PENDING APPEAL.

Ordered Motion of Appellant for admission to bail pending appeal, filed April 20, 1946, argued by Mr. Anthony J. Kennedy, counsel for the appellant, and by Mr. Emmett J. Seawell, Assistant United States Attorney, counsel for appellee, and submitted to the Court for consideration and decision.

It is Further Ordered that the said motion be, and hereby is granted, and that the appellant be admitted to bail in the sum of \$5000, said bond to be approved by the trial Judge, and Bond to be filed with the Clerk of the District Court for the Northern District of California, Northern Division.

It Is Further Ordered that the appellant may deposit said sum of \$5000 with the Clerk of the said District Court, in lieu of Bond.

No. 11,307

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

TONY LEGATOS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Northern Division.

APPELLANT'S OPENING BRIEF.

ANTHONY J. KENNEDY,

Forum Building, Sacramento 14, California,

JOHN L. BRANNELLY,

Ochsner Building, Sacramento 14, California,

ERNEST J. TORREGANO,

Mills Building, San Francisco 4, California,

Attorneys for Appellant.

FILED

AUG 7 - 1946

PAUL P. O'BRIEN,

CLERK

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No. 11,307

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TONY LEGATOS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Northern Division.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

This case comes to the Circuit Court of Appeals from a jury verdict finding the defendant, Tony Legatos, guilty of violating Section 2871, Internal Revenue Code, and the judgment of the District Court for the Northern District of California, Northern Division, Hon. Martin I. Welsh, presiding, sentencing the defendant to imprisonment for two years, and to pay a fine of \$1,000.00.

STATEMENT OF PLEADINGS AND FACTS.**(A) PLEADINGS.****Indictment.**

The indictment in this case consists of two counts. The second count charged the violation of Section 2803 of the Internal Revenue Code. The jury acquitted the defendant on this count and it is eliminated from discussion.

The indictment in the first count charged that defendant reused 31 liquor bottles (specifying the labels on the bottles), in violation of the provisions of Section 175.41 of Regulations 13, prescribed by the Secretary of the Treasury, in pursuance of Title 26 U.S.C. Section 2781. (Printed record, pages 2 and 3.)

Motion to dismiss, quash and make more certain.

Prior to plea of not guilty, motion to dismiss and quash the first count of the indictment was filed, setting forth that the allegations of the First Count did not state an offense against the laws of the United States, and a motion for an order directing the first count of the indictment to be made more certain: (a) to designate and indicate for what purpose, if at all, such 31 liquor bottles were reused; and (b) how and in what manner defendant violated the provisions of Section 175.41 of Regulations 13. (Printed record, pages 4 and 5.)

The motions were denied. (Printed record, page 6.)

Motion to suppress.

Prior to trial, appellant filed a verified petition and motion to suppress evidence and return property. This petition alleged that federal officers were in possession of 31 bottles of liquor, referred to in the indictment, obtained by a search and seizure without a warrant and without the consent or authority of the defendant. (Printed record, pages 6 to 8.)

The motion to suppress was denied. (Printed record, page 9.)

On the hearing of the motion to suppress, evidence was introduced which will be stated in the Statement of Facts.

Motion for new trial.

After verdict, and prior to judgment, written motion was filed under Rule 29(b) of the Federal Rules of Criminal Procedure, for renewal of motion for judgment of acquittal and in the alternative, motion for a new trial. This motion set forth generally the matters of errors made the specification of errors on this appeal. (Printed record, pages 16 to 18.)

(B) STATEMENT OF FACTS.

The facts in the instant case are simple and for the most part undisputed. Tony Legatos owns 16 or 17 restaurants and bars in Northern California, including the Golden Tavern at 621 K Street, Sacramento, operated by him through Nick Theodoratus, manager. Chris Maritsas, co-defendant, was employed at the tavern as a bartender. On July 18, 1946, agents

of the Alcohol Tax Unit visited the establishment without a warrant, showed their credentials, went behind the back bar and removed some forty bottles. These they tested with a "Williams' Test Set" to ascertain the alcoholic content and character of liquor and finding thirty-one of the bottles "irregular", confiscated them.

The following day, the agents talked to Maritsas and Legatos. Maritsas told the agents that he had filled fourteen of the bottles labelled "Schenley Whiskey" with equal parts of Schenley Whiskey and Ron Marana rum, and that the remaining confiscated bottles had been refilled by other bartenders by pouring from one bottle to another. Maritsas at the time stated that Legatos was ignorant of these actions and Legatos likewise advised the agents that he knew nothing of any refilling—that he had always instructed his bartenders to obey all laws and not tamper with bottles.

Facts which create an issue of law pertinent to this appeal are taken from the record as follows:

On the hearing of the petition to suppress evidence and return property, testimony was taken and witnesses were called and sworn and testified as set forth in summary form:

Tommie O'Leary. I am employed as a bartender at the Golden Tavern. Leonard D. Sanderson came into the bar on July 18th with another man, showed me his badge, told me he wanted to inspect the liquor in the back bar, so I let him go. He took all the open

bottles of liquor to a table in the rear and later took them away. I am not the manager of the place. (Printed record, pages 30 to 35.)

Tony Legatos. The search on July 18th, was made without my knowledge or authority. Nick Theodoratus is the manager of the Golden Tavern. On July 18th he was sick. I do not know whether he was on the premises or not. He has authority to conduct the business. (Printed record, pages 35 to 38.)

Leonard D. Sanderson, Inspector, Alcohol Tax Unit. On July 18th, accompanied by Mr. Tschierschky, another agent of the Alcohol Tax Unit, I went to the Golden Tavern, at ten o'clock in the morning. We had no search warrant. We presented our credentials to Mr. O'Leary, told him we were there to inspect the open bottles, went behind the bar, took approximately 40 open bottles to a table in the rear to conduct our tests. We had no permission from Mr. Legatos. (Printed record, page 42.) Mr. Theodoratus came in about 10:20 while we were testing with the Williams' Test Set. We had not completed our test, when Mr. Theodoratus came in. We had tested a few bottles and found that the contents did not conform to the labels. (Printed record, pages 43 and 44.)

The only conversation we had with Mr. Theodoratus was while he was working in the basement on some invoices; as soon as we found a bottle that was bad, we would take the bottle down to him and show him our test and he could not explain it because he said

he was home ill. (Printed record, page 46.) The authority we had to enter the premises was to make routine inspections, revenue stamps, wine stamps, bootleg whiskey—licensee. No one objected to our search or requested us to leave the premises, and no force or duress was used. (Printed record, page 49.)

(C) TESTIMONY ON THE TRIAL OF THIS CASE.

Witnesses were called for the government, sworn and testified. The portions of their testimony material to this appeal, not otherwise set forth in the statement of facts, is set forth in summary form with objection and rulings being shown in brackets and italicized.

Leonard D. Sanderson. (Testified generally to same facts as in motion to suppress, and in addition.) No one, other than Tommie O'Leary, bartender, was in authority when Inspector Tschierschky and I visited the Golden Tavern on July 18th. We removed the bottles from behind the back bar to test with the Williams' Alcohol Test Set and took the bottles to a rear booth at the rear table for that purpose. (Printed record, pages 54 and 55.)

The Williams' Test Set is field equipment to show whether blended spirits have been put in straight whiskey, or the bottle has been diluted with waters or liquids. (Printed record, page 56.)

(Permission granted at this time to cross-examine the witness with reference to the search and seizure.) (Printed record, page 59.)

I am not a chemist and have no technical training in chemistry. (Printed record, page 60.)

The Williams' Test consists of a graduated tube, along with a chemical compound used in connection with distilled spirits. In order to use the Williams' Test, it is necessary to take from a bottle a portion of the material that is in the bottle, put it in the tube and rinse out the tube. (Printed record, page 61.)

(Further examination of witness Sanderson on the nature of the search and seizure denied. (Printed record, page 64.)

Motion made that evidence relative to the search and seizure be excluded on the ground it was a contravention of the defendant's rights under the Fourth and Fifth Amendment. (Printed record, page 65.) Motion denied. (Printed record, page 66.).)

31 bottles introduced in evidence for identification. (Printed record, pages 67 to 86, inclusive.)

At about 10:20, Mr. Theodoratus came to the establishment and I went downstairs to have a talk with Mr. Theodoratus in regard to his knowledge of these bottles having been refilled. (Printed record, pages 86 and 87.) We took the bottles and delivered them to Mr. R. F. Love, Bureau of Chemists, in San Francisco. (Printed record, page 88.)

The next day, at approximately 12:00 o'clock, we had a conversation with defendant Maritsas, about refilling the bottles. (Printed record, page 88.)

(Objection made that statements made by defendant not admissible until the corpus delicti proved. Objection overruled. (Printed record, page 89.).)

Maritsas told us that 14 of the Schenley bottles that had been introduced were filled by him with half rum and whiskey and the remaining 17 bottles were refilled by bartenders at the close of the day's business by pouring small portions of one brand of spirits into another bottle. (Printed record, page 90.)

I had a conversation with Legatos. He said he had no knowledge of this and he had instructed his bartenders and his managers absolutely not to refill any spirit liquor or pour it from one bottle to another. (Printed record, page 90.)

Alex Tschierschky, agent of the Alcohol Tax Unit, testified substantially the same as Sanderson.

Dr. R. F. Love, Chemist, Internal Revenue Bureau. The 31 bottles introduced for purposes of identification were brought to me on the 1st day of August, 1945. I analyzed their contents, to determine the proof or alcoholic content, the acidity, color and the solid matter and in some, whether or not they contained caramel. (Printed record, pages 114 and 115.) I used a control bottle in making the test, namely, an unopened bottle of the same brand as the one in question; i.e., when I made a test of the bottles labelled Schenley's, I had a bottle of Schenley's which had been unopened and broke the seal and made a test of that bottle for control. (Printed record, page 117.)

With reference to this Exhibit 6 for identification, I tested it for proof and the proof is 85.5. The label says it should be 86. I found it had 21.6 parts of acid, and the control bottle 32.4, the color in the Exhibit was 7.4 and in the control bottle 9.5, in solids 105.4 and in the control bottle 148.2. (Printed record, pages 116, 118.)

(To the question, "What does that indicate?", referring to the above testimony, objection was made that it called for an opinion and conclusion of the witness. Objection overruled. (Printed record, page 119.).)

The figures are small, but the difference is relatively large, indicating that the liquor in this bottle is not the same as the liquor in the control bottle, or the same brand, that rum has been added. I cannot tell what percentage of rum. (Printed record, page 119.)

31 bottles admitted into evidence on same character of testimony and subject to same and other objections. (Printed record, pages 120 to 144.)

Laverne Lewis. I live in Sacramento. I went to work for Tony Legatos in 1941 and worked for him until the last few days. I worked as a clerk or book-keeper, with offices at 220 Ochsner Building. (Printed record, page 169.)

The Log Cabin Tavern is a place owned by Mr. Legatos. There about February 1st, of 1945, I had a conversation with Mr. Legatos about some rum.

(Printed record, page 170.) Mr. Legatos said: "I have forty or fifty cases here and I am going to move it. I am going to give each one of my managers so much and ask them to press it in their sales". (Printed record, page 171.) I know the rum was moved from the Log Cabin Tavern and I know some of it, but not how much, went to the Golden Tavern at 621 K Street. (Printed record, page 171.)

The only other conversations I had with Mr. Legatos about rum, was when we talked between ourselves, he said: "I am going to get rid of this rum, I am overstocked on it." (Printed record, page 172.)

Cross-Examination.

At the time I had my conversation with Mr. Legatos, he had forty or fifty cases of rum at 701 Jay Street. This rum was taken to other places, including one offsale premises at 622 K Street. (Printed record, page 174.) He has five places in Sacramento and five places in Vallejo, some restaurants without liquor licenses, and other places in Northern California. (Printed record, page 175.)

At the time he stated he wanted to get rid of the forty or fifty cases of rum, he did not say anything about mixing rum with whiskey and I did not want to convey that idea. (Printed record, page 176.)

I know of my own knowledge that Mr. Legatos insists that his places be operated according to law. (Printed record, page 176.)

Redirect Examination.

(Objection made on ground of improper redirect and attempt to cross-examine own witness on conversations had between government attorney and witness. Objections also made to calling for opinion and conclusion of witness as to question of witness's statement of her opinion if Legatos had violated law. Objections overruled. (Printed record, pages 177, 178.))

Since I talked to Mr. Seawell yesterday, I have talked to Mr. Legatos and Mr. Brannely. (Printed record, page 177.) I did not tell you, Mr. Seawell, that Mr. Tony Legatos did not operate his bar in a lawful manner, what I said was in a very careless manner, I might have told you that in my opinion he knew about the rum being put into these bottles. I said he had said to push the rum and brandy sales. (Printed record, page 178.)

Recross Examination.

My conversation with you about this case, Mr. Brannely was that I told you I did not like your attitude, and I told you nothing. (Printed record, page 180.)

(Motion for judgment of acquittal made and denied. (Printed record, page 183.))

TESTIMONY FOR DEFENDANT.

Three character witnesses testified that the defendant Tony Legatos had a good reputation in the Sacramento community as a law abiding citizen. These witnesses were, Edward Thomas Coghill, owner printing plant (Printed record, pages 184 to 186), Walton E. Holmes, Vice-President and Secretary of the Capital National Bank (Printed record, pages 186 to 193), George E. Zoller, Banker (Printed record, pages 194 to 195), and Frank Raymond Elmer, owner of Elmer Paper Company, Supervisor, County of Sacramento. (Printed record, pages 211 to 216.)

Chris Maritsas, co-defendant. On July 17th of last year, I was employed by Tony Legatos as a bartender. I admitted to the agents in July and later that I filled 14 bottles of Schenley's with rum, because I was short of Schenley's and the rum was good stuff to put in. (Printed record, page 196.) The rum was taken from bottles with government stamps on them. (Printed record, pages 197 and 198.)

I received no profit from the sale of liquors. (Printed record, page 201.)

Mr. Legatos never gave me any instructions to put rum in whiskey or any other bottle and I never had any discussion with Mr. Legatos about doing it. (Printed record, pages 202 and 203.)

Mr. Legatos used to come in the place sometimes once in two weeks, sometimes once a month, sometimes he did not come for a month and a half. I am not there all the time. I used to work from 4:00 to 12:00.

I do not know whether he is there between the time the place opened at 4:00 o'clock or not.

Tony Legatos, defendant. I have lived in Sacramento since 1918. I am a restaurant man. I operate between 16 and 17 restaurants and bars in San Francisco, Sacramento and Vallejo. (Printed record, pages 204, 205.) I did not know anything about putting rum into whiskey bottles at the Golden Tavern until the 19th of July, when the agents notified me. I told them I knew nothing about it. (Printed record, page 205.) I have a manager to operate the Golden Tavern. (Printed record, page 206.)

In connection with Mrs. Lewis' testimony, I did tell her I had 40 or 50 cases of rum and I told her I was going to send it to different establishments. (Printed record, page 207.) I had no intention at any time that the rum sent to my various establishments should be mixed with whiskey. (Printed record, page 208.)

I am familiar with the laws and rules with relation to the conduct of bars. I spend some of my time in Sacramento. I spend lots of time in Vallejo. I reside here and have my office here and spend most of my time here. I seldom go into the bars that I own. I keep books and have an accountant go over with me how much the bars sell. I can't say I do it every day. (Printed record, page 210.)

Evidence closed, motion for judgment of acquittal made and denied. (Printed record, page 215.)

STATUTES AND RULES INVOLVED.

The following statutes and rules are pertinent to a consideration of this appeal:

(a) Section 2871 of Internal Revenue Code, 26 U.S. Code 2871, 53 Stat., 331, the full text of which is:

“REGULATION OF TRAFFIC IN CONTAINERS OF DISTILLED SPIRITS.

Whenever in his judgment, such action is necessary to protect the revenue, the Secretary is authorized, by the regulations prescribed by him, and permits issued thereunder if required by him (1) to regulate the size, branding, marking, sale resale, possession, use and re-use of containers (of capacity of less than five wine gallons) designed or intended for use for the sale at retail of distilled spirits (within the meaning of such term as it is used in Section 2803) for other than industrial use, and (2) to require, of the persons manufacturing, dealing in, or using any such containers, the submission to such inspection, the keeping of such records, and the filing of such reports as may be deemed by him reasonably necessary in connection therewith. Whoever willfully violates the provisions of any regulation prescribed, or the terms or conditions of any permit issued, pursuant to the authorization contained in this section, and any officer, director, or agent of any corporation who knowingly participates in such violation, shall, upon conviction, be fined not more than \$1,000 or be imprisoned for not more than two years, or both; and, notwithstanding any criminal conviction, the containers involved in such violation shall be forfeited to the United States, and may be seized and condemned by like

proceedings as those provided by law for forfeitures, seizures, and condemnations for violations of the internal-revenue laws, and any such containers so seized and condemned shall be destroyed and not sold. Any requirements imposed under this section shall be in addition to any other requirements imposed by, or pursuant to law, and shall apply as well to persons not liable for tax under the internal-revenue laws as to persons so liable."

(b) Section 175.41 of Regulations No. 13, Secretary of the Treasury Section 41 of Code of Federal Regulations, Title 26, Internal Revenue, Chapter 1, Bureau of Internal Revenue, Sub-Chapter C, Miscellaneous Excise Tax, Part 175, Traffic in Containers and Distilled Spirits, the full text of which reads:

"Section 175.41. No liquor bottle or other authorized container shall be reused for the packaging of distilled spirits, except as provided in Section 175.14, nor shall the original contents, or any portion of such original contents, remaining in liquor bottle or other authorized container be increased by the addition of any substance."

STATEMENT OF POINTS.

The following is the statement of points filed by appellant with reference to the printed record necessary for consideration of each point respectively:

1. The court erred in denying the motion to quash the first count of the indictment.

Indictment. (Printed record, pages 2 and 3.) Motion to dismiss and motion to make more certain. (Printed record, pages 4 and 5.) Denial of motion. (Printed record, page 6.)

2. The court erred in denying defendant's motion to suppress evidence and return property.

Written motion. (Printed record, pages 6 and 8.) Denial. (Printed record, page 9.) Testimony at time of trial. (Printed record, pages 59 to 66.)

3. The court erred in admitting over objection, testimony based on an unlawful search and seizure.

Motion to suppress made and denied during trial. (Printed record, pages 65 and 66.)

4. The court erred in admitting into evidence over objection, bottles and the contents thereof, obtained through unlawful search and seizure.

Objection to ruling. (Printed record, pages 65 and 66.)

5. The court erred in admitting into evidence without proper foundation, over objection, bottles and their contents.

Objections made. (Printed record, pages 116 and 119.) Objection goes to all testimony. (Printed record, page 120.)

6. The court erred in admitting over objection testimony as to the statement of a co-defend-

ant prior to the establishment of the corpus delicti.

Objection made and overruled. (Printed record, page 89.)

7. The court erred in admitting over objection, hearsay testimony and opinion evidence of the government witness, Laverne Lewis, and in allowing the government attorney to cross-examine such witness.

Objections and ruling. (Printed record, pages 177 to 179.)

8. The court erred in denying defendant's motion for judgment of acquittal at the close of the government's case.

Motion made and denied. (Printed record, page 183.)

9. The court erred in denying defendant's motion for judgment of acquittal at the close of the taking of testimony in the case.

Motion made and denied. (Printed record, page 215.)

10. The court erred in instructing the jury:
(a) By giving inconsistent instructions.

Waived.

(b) By instructing the jury that Section 2871 of the Internal Revenue Code required no intent to constitute a violation.

The instruction is as follows:

“You are instructed that the offense charged in this indictment as against Tony Legatos is of that class in which it is not necessary to prove guilty intent. This defendant, being engaged in the business of selling distilled spirits which had been bottled while in bond, whether he conducted it by himself or his agent, was bound at his peril to see that there was no re-use of any bottles for the purpose of containing distilled spirits, which had once been filled and stamped under the provisions of the Act in question, without removing and destroying the stamp previously affixed to such bottle. If the bottles in question were refilled, they have been re-used—if the bottles in question were refilled, they have been re-used. Agents of the defendant Tony Legatos, if one of them acting—I will go over this again.

If the bottles in question were refilled, they have been re-used. If one of the agents of the defendant Tony Legatos, acting within the scope of his employment, re-used the bottle without removing and destroying the stamp, then this defendant’s liability is the same as if he had re-used it himself.” (Printed record, page 256.)

(The instruction was given three times, once in the general instruction, at page 256, as quoted above, and again on special request for advice from the jury at pages 264 and 265. Objections to the giving of the instruction appears in the printed record at pages 262, 263, 266, 278.)

(c) By instructing the jury that irrespective of the lack of knowledge of defendant as an em-

ployer, the defendant could be held criminally liable for the acts of his employee.

This is the same instruction as given in 10(b) above, with same reference.

(d) By instructing the jury on Treasury Department Regulations, namely, Section 188.57 of Regulations 6, and Section 22 of Regulations 5.

Waived.

11. The court erred in refusing to instruct the jury:

(a) That the jury, in order to find the defendant guilty under the first count, must find that the defendant wilfully violated Section 175.41 of Regulations 13.

Proposed Instruction 4, at page 237, printed record, was as follows:

“Before either defendant may be found guilty under the first count of the indictment, it is necessary that you find beyond all reasonable doubt that he ‘wilfully violated’ the regulations involved. Wilfullness is made a vital ingredient of the crime by statute, and this means that the defendant must have had a knowledge and a purpose to do wrong.”

(b) That the contents of the bottles introduced into evidence were not evidence against the defendant.

Waived.

(c) That an employer was not criminally responsible for the acts of his employee unless the employer authorized such acts.

Proposed Instruction 10 appeared at pages 239 and 240 of printed record and was as follows:

“You may not presume that other persons, even though they were employees, had authority to do a criminal act on behalf of either defendant; and if you find that some or all of the bottles described in the First Count of the Indictment were re-used in violation of regulations, but do not find that both of the defendants personally re-used the bottle or bottles, then as to each defendant who did personally not re-use any bottles, unless you find beyond all reasonable doubt that he directly authorized or consented to the re-use in violation of regulations it is your duty to acquit him under the First Count of the Indictment.”

No specific objection was made for failure to give instruction 10, but objection to the whole character of instruction on intent appears at pages 266 to 268 of the printed record.

12. The court erred in denying defendant's motion for a new trial, or in the alternative, a judgment of acquittal.

The written motion appears at pages 16 to 18, printed record. Denial of the motion appears at page 19, printed record.

ISSUES INVOLVED.

The statement of points on which appellant intends to rely on appeal filed herein, contains twelve points some with several subdivisions. Basically, the points as set forth involve five fundamental issues:

(a) That the indictment in the first count does not state an offense against the United States for the reason that the acts constituting a violation of section 175.41 of Regulations 13 are not specified;

(b) That the evidence was insufficient to justify sending the case to the jury against the defendant Tony Legatos for the reason that no specific act of violation was proved against him and no showing was made that the defendant Legatos had participated in, had knowledge of, or consented to the act of his employee and co-defendant, Maritsas, in refilling certain bottles;

(c) Misconception of the provisions of section 2871 of the Internal Revenue Code by the government and the court resulting in the court instructing the jury that wilfulness was not an ingredient of the crime and that the defendant Legatos was "bound at his peril" for the acts of his employee, and also the refusal of proper instructions on "intent" and that an employer was not liable criminally for the acts of his employee when the acts were without participation, consent or knowledge of the employer;

(d) Violation of defendant's constitutional rights under the fourth and fifth amendment through an unlawful search and seizure;

(e) Errors in the admission of testimony, in particular, testimony of a confession by the defendant Maritsas prior to the proof of the corpus delicti; error in the admission of testimony of an expert witness that in his opinion the bottles were refilled, thus taking from the jury the ultimate fact to be decided by them in the case; error in the admission of testimony of the government witness on the examination by the prosecuting attorney that she might have stated in a private conversation with the United States Attorney that in her opinion Legatos knew about the acts of his employee in refilling the bottles.

The argument to follow will consider the questions of law as thus grouped above, relating them to particular points as they appear in the statement of points filed by appellant.

ARGUMENT.

POINT 1.

THE COURT ERRED IN DENYING THE MOTION TO QUASH THE FIRST COUNT OF THE INDICTMENT.

The indictment in this case in the first count charged that defendant:

“Did wilfully, knowingly and unlawfully re-use liquor bottles, to wit, a total of 31 bottles, as follows: (There follows a description of whiskey bottles by capacity and label), in violation of the provisions of Section 175.41 of Regulations 13, prescribed by the Secretary of the Treasury, in

pursuance of the provisions of Title 26, U.S.C. Section 2871.” (Printed record, pages 2 and 3.)

Thus the gist of this indictment is that the defendant re-used liquor bottles in violation of the provisions of Section 175.41.

A motion to dismiss and quash the first count was filed on the grounds that the allegations did not state an offense against the laws of the United States. At the same time, a motion to make more certain the first count of the indictment was filed, the motion seeking that the indictment be made more certain in the following respects: (a) To designate and indicate for what purpose, if at all, said liquor bottles were re-used; and (b) How or in what manner defendant violated, if at all, the provisions of Section 175.41 of Regulations 13. (Printed record, pages 4-5.)

It was error to deny the above motion. Section 175.41 of Regulations 13 derives vitality from the provisions of Section 2871 of the Internal Revenue Code. Any rule adopted is subordinate to the statute.

It is conceded that administrative officers under appropriate statutory authority may enact rules and regulations to carry out a policy declared by Congress, even though the statute makes violation of the rules a public offense. (*U. S. v. Grimaud*, 220 U.S. 506, 55 L. ed. 563, 31 S. Ct. 480.)

Such rules and regulations, however, are at all times subordinate to the statute and any rule so adopted must be in accord with the authority granted and the policy of Congress as expressed in the legis-

lation. (*U. S. v. George*, 220 U. S. 14, 55 L. ed. 712, 33 S. Ct. 412, holding that a defendant could not be held guilty of perjury for filing a false affidavit as to facts of occupation of homesteaded lands where the agency's form of affidavit required data as to occupation not contained in the statute "where the charge is a crime it must have a clear legislative basis".)

Section 2871 of the Internal Revenue Code gives authority to the Secretary of the Treasury, in order "*to protect the revenue * * * to regulate the size, branding * * * sales * * * use and re-use of containers * * **" Section 175.41 of Regulations 13 does not regulate—it entirely prohibits re-use for certain purposes. It might be contended that an entire prohibitory rule, adopted under statutory authority to regulate in protection of the revenue, is void as an attempt to legislate beyond the delegated authority. (See *U. S. v. Bardenheir* (1892), 49 Fed. 846, stating: "Congress was legislating for the protection of the revenue rather than private wrongs".) That contention, however, is not raised in this case for the reason that ample other considerations require a reversal, making discussion of the validity of the rule beyond the confines of strict error.

The point, however, is mentioned to emphasize the severity of the rule and its restrictive characteristics, and to make manifest that, in common with all administrative regulations, care must be exercised in enforcement and prosecution to insure the integrity of the statute as well as the rule. Violations of the rule must be charged with certainty and definiteness and

obviously no less so because it is a rule and not a statute.

Tested by the standards applied to indictments charging violations of statutes, it is submitted the first count is fatally defective and the motion to quash should have been granted. The particular rule, Section 175.41 is not an absolute prohibition of all re-use of liquor bottles. It prohibits the re-use of liquor bottles for (a) the "packaging of distilled spirits", or (b) the increase of the original contents by the addition of any substance. Specific acts for specific purposes are required to violate. A mere allegation that the defendant re-used bottles in violation of Section 175.41 is not a statement of acts constituting an offense. The acts of criminal offense are the re-using of bottles for the purpose of packaging distilled spirits or adding substances to the original content of the bottle. No such acts are set forth in the indictment. Judicial authority settles beyond possibility of challenge that such a failure of statement renders the indictment void.

In *United States v. Standard Brewery* (1920) (251 U. S. 210, 64 L. ed. 229, 40 S. Ct. 139), the defendant was charged with a violation of the wartime prohibition act in the use of cereals in the manufacture of beer containing as much as $\frac{1}{2}$ of 1 per cent alcohol. Proclamation prohibited the use of certain cereals in the manufacture of intoxicating liquors. The court held that the indictment was insufficient, stating:

"An indictment must charge each and every element of an offense. *Evans v. United States*, 153

U. S. 584, 587, 38 L. ed. 830, 831, 14 S. Ct. Rep. 934, 9 Am. Crim. Rep. 668. We cannot say, as a matter of law that a beverage containing not more than $\frac{1}{2}$ of 1 per cent of alcohol is intoxicating, and as neither indictment so charges, it follows that the courts below in each of the cases correctly construed the act of Congress, and the judgments are affirmed." (251 U. S. 210, 220, 64 L. ed. 229, 235.)

The statement that the defendant "violated Section 175.41 of Regulations 13", falls into a category that the Ninth Circuit Court condemns as "sheerest conclusion". *Collins v. United States* (CCA 9th 1918), 253 Fed. 609, considered an indictment for violating the Espionage Act. The indictment charged that the defendant wilfully made and conveyed false reports and statements with the intent to interfere with the military operation of the United States. The court condemned this as the "sheerest conclusion", as no reports or statements were specified:

"Now, as to the sufficiency of the indictment: Where a statute declares that certain or specific acts, or the doing of certain things, shall constitute an offense, it is always necessary to state what the accused did whereby he transgressed the law, in order that he may be advised of the specific charge made against him, to enable him to concert his defense, and to avail himself of his conviction or acquittal against further prosecution of the same cause, and, further, to advise the court of the facts relied on for conviction, so that it may determine whether they are sufficient in such a case to state the supposed offense in the language of the statute." (253 Fed. 610.)

In the instant case, no attempt was made to state the purpose for which the bottles were re-used. Neither the defendant nor the court could possibly be advised by the indictment what acts were to be relied upon for conviction. No attempt was made to state the supposed offense in the language of the rule.

As a test of the sufficiency of an indictment the court in the *Collins* case sets out the standard from *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588:

“Therefore the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense alleged.” (253 Fed. 609, 611.)

The indictment in the instant case does not specify the purposes for which the liquor bottles were re-used. The acts of violation, if any, do not appear from the indictment, but must be supplied by implication or by waiting until the trial of the case then to ascertain for the first time what particulars the government relies upon to constitute the offense.

But in *Harris v. United States* (CCA 8th, 1939), 104 F. (2d) 41, it was held that deficiencies in essential averments cannot be supplied by implication:

“It is fundamental that all the necessary ingredients of the offense must be set out in the indictment, and the omission of any fact or circumstance necessary to constitute the offense will be fatal. *United States v. Cruikshank, et al.*, 92

U. S. 542, 23 L. ed. 588. Any omission of that nature cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially, or by way of recital.” (*United States v. Hess*, 124 U. S. 483, 8 S. Ct. 591.)

“Section 189 does not make it a crime to forge *any* paper, or to make a false entry in *any* record. It makes it a crime for a person occupying the position defendant did to make a false entry in any record which he was required to keep in connection with his duties—records of the Postoffice Establishment at Lebanon. The indictment does not say that he made a false entry in any record which he was required to keep in connection with his official duties, nor does it say that he forged or made a false entry in any record of the Lebanon Postoffice.” (104 Fed. 41, 45.)

A general reference to a statute or rule, as for example “that the defendant violated Section 175.41”, does not supply the essentials of an indictment. This is clearly exemplified by the case of *Hale v. United States* (CCA 4th, 1937), 89 F. (2d) 578.

In the *Hale* case, the defendant was convicted on one count of an indictment which charged violation of the Harrison Narcotics Act. The charge was selling morphine not in the original stamped package. The statute, however, excepted registered retailers who might sell *from* a stamped package. The court held that the indictment was defective for the reason that it should have charged that the sale was not made *in* an original stamped package, nor *from* an original

stamped package. To the contention that the statute supplied the deficiency, the court said:

“It is elementary that every ingredient of the crime must be charged in the bill, a general reference to the provisions of the statute being insufficient. *The Schooner Hoppet & Cargo v. United States*, 7 Cranch 389, 3 L. ed. 380; *Pettibone v. United States*, 148 U. S. 197, 13 S. Ct. 542, 37 L. ed. 419; *United States v. Standard Brewery*, 251 U. S. 210, 40 S. Ct. 139, 64 L. ed. 229.” (89 F. (2d) 578, 579).

The nature of the violation charged in the first count of the indictment in the instant case could only be ascertained upon a trial of the case. The re-use of liquor bottles may be entirely innocent, depending upon the purpose for which the bottles were re-used. But nowhere in the indictment does that purpose appear—the ascertainment of such facts would only be had upon a trial of the case. Only then could one determine if the facts in the mind of the prosecutor constituted guilt or innocence under the law. In this respect, the failure of the indictment parallels the case of *Caldwell v. United States* (CCA 5th, 1934), 139 F. (2d) 121.

The *Caldwell* case involved a charge of conspiracy to violate regulations enacted under the Selective Training and Service Act. The first count charged the defendant Caldwell with a conspiracy in that he caused another registrant to wilfully leave Chicago and proceed to Miami, Florida, wilfully neglecting to inform the registrant's draft board of the change

of address and thus to evade military service under the requirements of the Act. The court held the indictment bad, stating:

“It is not a violation of the statute to cause a selected man to leave the place of registration. Nor, is it a violation of the statute to wilfully neglect to inform registrant’s local board ‘of a change of address’. The offense under the act and regulations, is the wilful failure of the registrant ‘to keep his local board advised at all times of the address where mail will reach him’. While it may be conceded that the failure to notify the Board of a change in address in all probabilities would as a matter of fact frequently lead to a failure to keep the local board advised of the address where mail would reach the registrant, this does not necessarily follow and at most is only one of the fact elements going to make up the offense rather than the offense itself. On the other hand, one might change his place of residence six times and yet comply with the provisions of the statute. In a case where liberty may be at stake, the criminal charge should measure up to the test of the statute and then be supported by facts. *It is not proper to permit the charge of an act which is innocent in itself under the statute and regulations to be used as a means of trial and as authority for the introduction of evidence disclosing the commission of an offense.* In other words, a violation of the statute and regulations should be charged rather than the allegation of an act which may or may not constitute an offense.” (139 F. (2d) 121, 124). (Italics added.)

Paraphrasing the above case and applying the reasoning to the instant case. It is not a violation of Section 175.41 of Regulations 13 to re-use liquor bottles; the offense under Section 2871 of the Internal Revenue Code and Section 175.41 is the wilful re-use of a liquor bottle for the packaging of distilled spirits or the increasing of the original contents by the addition of any substance. By failing to allege the purpose of the re-use of the bottles, the indictment stated a charge innocent in itself, the only function of the indictment being to act as a springboard for the introduction of evidence that might uncover a crime.

It is respectfully submitted that the denial of the motion to quash the first count constituted reversible error.

POINT 2.

**THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO
SUPPRESS EVIDENCE AND RETURN PROPERTY.**

In advance of trial a hearing was had upon defendant Legatos' motion to suppress evidence and return the seized bottles of liquor to him. (Printed record, pages 29-49.) The nature of the search, and of the seizure which followed upon it, are discussed together with the applicable law under Point 3, and reference is made to that portion of the brief for argument upon the error in denying this motion.

POINT 3.

THE COURT ERRED IN ADMITTING, OVER OBJECTION, TESTIMONY BASED ON AN UNLAWFUL SEARCH AND SEIZURE.

The evidence in this case shows that Federal agents entered the defendant's place of business without a warrant, while only a bartender was present, showed their credentials, stated that they were there to inspect the open bottles, went behind the bar, took from behind the bar all open bottles to a table in the rear and then proceeded to test the contents of the bottles by a patented device known as the "Williams' Test Set". (Printed record, pages 54 and 55.) The "Williams' Test Set" equipment consists of a graduated tube, together with a chemical reagent; the testing is done by abstracting a portion of the contents of the bottles to be tested, rinsing out the tube and then taking an additional portion from the bottle and applying the chemical reagent so that the alcoholic content and the character of the liquor may be ascertained. (Printed record, page 61.)

At the time the agents removed the bottles from the back bar and commenced their tests, no one in authority was present. Later, after some of the bottles had been tested, the manager of the place arrived at the premises and went to the basement. There the officers would go on finding an "irregular" bottle and ask for an explanation from the manager, receiving none, except that he had been home ill. After the test had been completed, the bottles and the contents were seized.

The above facts present the ultimate in unreasonable search and seizure. A judicial decision has not been found where government agents arrogated to themselves authority to enter a retailer's place of business and under the guise of routine inspections abstract and destroy a portion of the contents of bottles for a test. By the very circumstances of such a method of inspection it is apparent that no crime was being committed in the presence of the officers.

Following the procedure approved in *Taylor v. United States*, 286 U.S. 1, 76 L. ed. 951, 52 S. Ct. 466, the defendant filed a timely petition to suppress the testimony so obtained. Motion to exclude the evidence on the ground that the search was without a warrant was made during the trial and denied. It is respectfully submitted the motion to suppress testimony and return the property and the motion to exclude evidence should have been granted.

The foundation of the right against unlawful search and seizure and the protection offered by the Fourth and Fifth Amendments are stated in *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 75 L. ed. 374, 382, where the court says as to the Fourth Amendment:

“It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent * * *. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty.

They are denounced in the constitutions or statutes of every state in the Union. *Agnello v. United States*, 269 U.S. 20, 33, 70 L. ed. 145, 149, 51 A.L.R. 409, 46 S. Ct. 4. The need of protection against them is attested alike by history and the present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. *Boyd v. United States*, 116 U.S. 616, 623, 29 L. ed. 746, 748, 6 S. Ct. 524; *Weeks v. United States*, 232 U.S. 389-392, 58 L. ed. 654, 655, L.R.A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177, *supra*."

A gradual depreciation of the protection granted by the Fourth Amendment will not be given judicial sanction by stealthy encroachment. As said in *Byars v. United States*, 273 U.S. 28, 47 S. Ct. 248, 71 L. ed. 520:

"The Fourth Amendment was adopted in view of the easy misuse of power in the matter of search and seizures both in England and the colonies, and the assurance of any revival of it, so carefully embodied in the fundamental law is not to be impaired by judicial sanction of equivocal methods, which regarded superficially, may seem to escape the challenge of illegality, but which, in reality, strike at the substance of the constitutional right."

The protection of the amendment extends to offenders as well as the law abiding. (*United States v. Lefcowitz*, 285 U.S. 452, 76 L. ed. 77; *Welles v.*

United States, 232 U.S. 383, 58 L. ed. 652, LRA 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177.)

While the courts have refused to lay*down a formula for the determination of what is reasonable (*Go-Bart Importing Co. v. United States*, *supra*), a ready test of a citizen's minimum right is to determine if the information possessed by the officers would be sufficient to constitute grounds for obtaining a search warrant for the premises. As a search warrant can be issued only on probable cause, and the right to search and seize without a warrant depends upon the commission of a crime in the presence of an officer, quite obviously if the facts at the time of the search would be insufficient to authorize the procurement of a search warrant, no claim can be made that the facts authorize a search and seizure without a warrant.

The records show that the officers were in the city of Sacramento a short distance from the Post Office Building where there is regularly sitting a district judge and a federal commissioner. There were two officers. A legitimate inquiry is: If the officers had probable cause to believe that an offense was being committed at ten o'clock in the morning of a business day, why did not one of the officers stay at the business premises to see that no evidence was destroyed, while the other walked or drove the short distance to the Post Office to procure a warrant? The fact that they did not in and of itself shows that no probable cause existed. As said by Judge Learned Hand in *United States v. Kaplan*, 89 Fed. (2d) 869, at

page 871, in holding void a search without a warrant sought to be justified upon the basis of smell:

“Any community must choose between the impairment of its power to suppress crime and such evils as arise from its uncontrolled prosecution, but the danger is not certain, for the officers could have applied for a warrant * * * it takes time to break up a still and take the parts away; if the attempt were made, it would discover itself immediately. One or more officers could have watched, while the others went to a judge or commissioner whose actions would at least have put a different face on the proceedings.”

But in the instant case the officers had no probable cause. They were making a general exploratory search and a search warrant would have been denied. A search warrant may issue only upon evidence which would be competent on the trial of the offense before a jury. (*Grace v. United States*, 287 U.S. 124, 77 L. ed. 212, 53 S. Ct. 38.) The agents had no evidence until the “tests” of each particular bottle were completed.

Merely because the defendant had a business requiring the keeping of records, gave no authority, other than to make routine inspections. In the argument on the motion to exclude evidence counsel for the government attempted to justify the search and seizure under paragraph (a) of Section 3601 of the Internal Revenue Code. This section authorizes entry in the daytime by internal revenue agents of any building where articles subject to tax are made or kept and to examine the articles. The powers and limitations of an agent under Section 3601 (a) were discussed

in the case of *United States v. Frisch* (CCA 5th, 1944), 140 F. (2d) 660.

In the *Frisch* case, officers concluded from examination of a bar that a false return had been made in making the inventory of liquor for floor tax purposes. This information was confirmed by breaking open a desk in the liquor bar and taking records. On retiring to a stairway outside the bar, they heard a noise upstairs and, on investigation, after breaking in a closet door, they found additional liquor and arrested the owner for the offense of evading the floor tax on liquors.

The court held that Section 3601 gave the officers the right to inspect the books required to be kept by a retail liquor dealer, and also the right to *see and count* the taxed liquor; but this was the maximum of their authority under Section 3601. The court held if additional search was necessary or required, they should have applied for a search warrant under Section 3602 of the Internal Revenue Code. The court said:

“As a retail liquor dealer, Frisch was bound to keep records concerning his stock which the officers had a right to see. Internal Revenue Code, Section 3252, and under Section 3601, we think they had a right to see and count the taxed liquors in the bar and the closet adjoining it. (140 F. 2d 660, at 662).”

The court held in the *Frisch* case that further searches without a warrant, other than to look and to count were unlawful and ordered that the evidence so obtained be suppressed and the articles returned.

Other cases hold the mere fact that the defendant must be licensed to conduct the business does not give officers the right to make general or exploratory searches. See *In re Lobasco*, 1926 D.C., 11 F. (2d) 892, holding that a prohibition agent who entered a drugstore for the purpose of examining records had no authority to enter a part of the store marked, "Private"; *United States v. Kozan*, 1930 D.C., 37 F. (2d) 415, holding unlawful search of drugstore made in absence of owner.

Likewise, the lack of objection upon the part of the bartender did not constitute consent. In the case of *United States v. Ruffner* (D.C. Md., 1931), 51 F. (2d) 579, it was held that an employee could not bind an owner by consenting to searching of premises for liquor in the absence of the owner. The court said:

"The agents apparently knew that Ruffner was the owner and Switzer only an employee; and they also knew or could readily have learned, that the owner was nearby. There was not such required haste in making the search as to preclude consulting the owner in person for permission. The Government did not undertake to prove that Switzer had in fact authority from Ruffner to permit the search. And, in the absence of such proof, the circumstances do not justify the application of the doctrine of apparent authority seemingly relied upon by the government," (51 F. 2d 579, 580. See also *Cofer v. United States*, 37 F. 2d 677, 679, holding that a wife is without authority to bind her absent husband by consenting to an unauthorized search; and *Amos v.*

United States, 255 U.S. 313, 317, 41 S. Ct. 266, 65 L. ed. 654, where the Supreme Court found it unnecessary to determine the question because of the implied coercion on the part of the agents affecting the wife.”).

Likewise, in *Farris v. United States* (CCA 1st, 1928), 24 F. (2d) 639 (certiorari denied in 277 U.S. 607, 72 L. ed. 1012, 48 S. Ct. 602), the court held there was no consent where the officers entered the house without a search warrant, stated they were there to make a search, to which the defendant replied, “All right, you will find nothing here now.”

As in the instant case, the court in the *Farris* case stated that from the evidence it was plain that the search would have been made in all events.

See also *United States v. Marra* (1930 D.C.), 40 F. (2d) 271, where the court held that after prohibition agents had come to the door and stated that they were going to inspect the premises, the defendant could not be said to have consented to the search by saying, “All right”.

From the cases, it is apparent that the owner not consenting and no crime being committed in the presence of the officers, the search and seizure made by the government agents was unreasonable and violated the constitutional rights of the defendant. The petition to suppress evidence and return property made prior to trial and the motion made during the trial to exclude evidence based on unlawful search and seizure were proper and should have been granted. It was error to deny the same.

POINT 4.

THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER OBJECTION, BOTTLES AND THE CONTENTS THEREOF, OBTAINED THROUGH UNLAWFUL SEARCH AND SEIZURE.

This is in substance the same error as resulted from admitting testimony based upon the unlawful search and seizure considered under Point 3, and reference is made to the portion of this brief covering Point 3 for argument as to this error.

POINT 5.

THE COURT ERRED IN ADMITTING INTO EVIDENCE, WITHOUT PROPER FOUNDATION, OVER OBJECTION, BOTTLES AND THEIR CONTENTS.

The bulk of the testimony in this case consists of identification by the witness Sanderson of the 31 bottles of liquor seized, which covers from page 66 to 86 of the printed record, and the testimony introducing these bottles into evidence by the witness Dr. Love, which required over fifty of the pages of the printed record, pages 114 to 168.

The witness Sanderson stated that he had tested the contents of the bottles with the "Williams' Test Set". However, there is nothing in the evidence to indicate the results of such test.

The technical testimony on the contents of the bottles came from the government witness, Dr. Love, chemist for the Internal Revenue Bureau. The doctor testified that he had received the bottles from Mr. Sanderson and tested the contents for proof,

acids, solids and color. (Printed record, pages 116 to 118.) These tests were made against a control bottle, a control bottle being defined as an unopened bottle of the same brand as the one in question and a comparison was made between the contents of one of the bottles seized and the control bottle of that particular brand. (Printed record, page 118.)

After testifying to the contents of the solids, departure was made from legitimate confines of expert testimony to the extent that the witness Dr. Love was authorized over objection to testify as a matter of opinion to the ultimate fact in the case as to each one of the 31 bottles, i.e. that in his opinion the bottles were refilled. This was error.

Objection was made to this character of testimony as shown by the printed record at pages 119, 120, 127, 129, 130, 132, 133, 134, 135, 142, 143.

The character of the objections and the nature of the testimony are all summarized in the testimony given by the witness on re-direct examination as shown by the following portion of the record:

“Q. In other words, as to every bottle, you have been examined about today, it is your opinion as an expert that every bottle—in other words, from number 149415 to 149445 inclusive—is a refilled bottle, is that correct?

A. Yes, sir.

Mr. Kennedy. Objected to as calling for a conclusion of the witness, and leading and suggestive.

Mr. Seawell. I am asking for his opinion as an expert witness.

Mr. Kennedy. Ask him what his testimony is, Mr. Seawell, don't tell him. Let him speak for himself.

Mr. Seawell. Q. I will ask you this then, put the question this way, doctor: In your opinion, were all the bottles, number 149415 to 149445, which are Government's Exhibits 1 to 31, inclusive, refilled bottles?

Mr. Kennedy. Objected to as calling for a conclusion of the witness on a vital issue, involved in the case.

Mr. Seawell. In your opinion, based on an analysis of each and every bottle, as an expert witness, is that true?

Mr. Kennedy. Same objection, your Honor.

The Court. What is the question?

Mr. Seawell. I have asked him in his opinion—I have asked him about a number of bottles—I am simply doing it to save time—he has testified as an expert witness to a number of bottles, but I think in trying to hurry this morning I eliminated two or three bottles, and I am simply asking him if, in his opinion as an expert witness, after examining each and every bottle he has referred to, if in his opinion all the Exhibits 1 to 31, are refilled bottles.

Mr. Kennedy. Object to on the same grounds.

The Court. Overruled.

A. It is my opinion, yes, sir."

(Printed record, pages 167, 168.)

The error in the nature of this testimony is shown on cross-examination. Dr. Love testified that there were variations in the control bottles of the same brand. (Printed records, page 146.) That insofar as

proof of the contents of whiskey is concerned, if left in an open container long enough the proof would disappear entirely. (Printed record, page 149.) That there is difference in the same brand of whiskey depending on the mash used, or the district where the grain came from and all these factors have to be taken into consideration. (Printed record, page 150.) That the witness was not at the distilleries when the bottles introduced into the evidence were filled and he had no knowledge of what went into the bottles. (Printed record, page 151.) That insofar as Exhibit 31 was concerned, he would not say it was not Scotch whiskey, it was in his opinion not all Black Label Scotch Whiskey. (Printed record, page 159.) That the proofs on control bottles would vary 1%, that is where the proof on the label was 86.81 it would vary from 87.81 to 85.81 and that he could give no statement as to what the variation in controls, in solids would be, on Johnnie Walker Scotch. (Printed record, page 156.) The same was true of acids, that the variation would be small, but he could give no actual figures (Printed record, page 157), and acids (Printed record, page 160), and color (Printed record, page 162).

With the witness showing on cross-examination that he was depending upon a very variable factor in the control bottles on which to base his opinion, it was extremely prejudicial to allow him to give his opinion as to the ultimate fact to the jury to decide, i.e., were the bottles refilled? *United States v. Spaulding*, 293 U.S. 498, 79 L. ed. 617, 55 S. Ct. 273. It was prej-

udicial error to evade the jury's province and take conclusions under the guise of expert testimony as to the ultimate issue in the case.

POINT 6.

THE COURT ERRED IN ADMITTING OVER OBJECTION TESTIMONY AS TO THE STATEMENT OF A CO-DEFENDANT PRIOR TO THE ESTABLISHMENT OF THE CORPUS DELICTI.

The government witness, Sanderson, identified for the record, the 31 bottles seized on July 18th, without any statement as to what was in the bottles or their contents when he was asked the question whether or not he had a conversation with the defendants in regard to the refilling of these bottles. Thereupon the following proceedings are shown of record:

“Q. And what was said by yourself and what was said by Mr. Maritsas in regard to the refilling of any of these bottles?

A. I talked—

Mr. Kennedy. Just a moment, if your Honor please. Objected to on the ground it calls for hearsay testimony—

Mr. Seawell. Calls for what?

Mr. Kennedy. —and there is no proof of the corpus delicti.

Mr. Seawell. May it please the Court—

Mr. Brannely. Your Honor, I make the same objection on behalf of Mr. Legatos, any statement made by any defendants are not admissible in evidence until the corpus delicti has been established. We base our objection on that ground.

The Court. Overruled.

Mr. Seawell. Will you proceed?

Mr. Kennedy. Further your Honor, there is no proper foundation.

The Court. Overruled.

Mr. Seawell. Go ahead, Mr. Sanderson."

(Printed record, pages 88 and 89.)

The witness then proceeded to relate the conversation he had had with Maritsas wherein Maritsas admitted that he had put rum in 14 of the bottles.

The evidence was not admissible for the reason that the *corpus delicti* was not shown. In *Gordiner v. United States* (CCA 9th, 1920), 261 Fed. 910, the defendant was convicted of failure to submit to registration under the Selective Draft Act of 1917. The whole evidence against him consisted of affidavits made by him as to his age. He contended the evidence was insufficient for the reason that the affidavits constituted admissions by him and must be corroborated by independent testimony. The Ninth Circuit Court agreed and stated:

"The plaintiff in error contends that no *corpus delicti* was shown and that it was error to admit the affidavits in evidence whether they be regarded as admissions or confessions and relies upon the rule which has been recognized in the courts of the United States that to sustain a conviction some sort of corroboration of the confession or admission is necessary."

On the basis of the rule so cited, the Court reversed the conviction. See also *Martin v. United States* (CCA 2d, 1921), 264 Fed. 950, and *Gullota v. United States* (CCA 8th, 1940), 113 F. (2d) 638.

So also the confession of a co-defendant is not admissible against the accused, in this case the defendant Legatos, to establish the *corpus delicti*. (22 CJS 1330, *Williamson v. State* (Ala.), 186 So. 785; *State v. Richetti* (Mo.), 119 S. W. (2d) 330, 342 Mo. 1015.) It was therefore error in view of the objections made for the court to admit the testimony of the confession by Maritsas as to the *corpus delicti* was not proved.

POINT 7.

THE COURT ERRED IN ADMITTING, OVER OBJECTION, HEARSAY TESTIMONY AND OPINION EVIDENCE OF THE GOVERNMENT WITNESS, LAVERNE LEWIS, AND IN ALLOWING THE GOVERNMENT ATTORNEY TO CROSS-EXAMINE SUCH WITNESS.

The witness Laverne Lewis, was a witness called by the Government. On direct examination she testified as to a conversation she had had with Tony Legatos about February 1, 1944, in reference to him disposing of some forty or fifty cases of rum that were located in the Log Cabin Tavern, a place owned by Legatos. (Printed record, page 170.) Legatos said, "I have got 40 or 50 cases here and I am going to move it and press the sales." (Printed record, page 171.)

On cross-examination, the witness testified that the rum was taken to other places. (Printed record, page 174.) That he never said anything about mixing the rum with whiskey and the witness did not want to convey that idea. (Printed record, page 176.) That

the witness knew of her own knowledge that Legatos insisted that his place be operated according to law. (Printed record, page 176.)

After this direct and cross-examination, the following redirect examination took place:

“Q. Did you talk to Mr. Legatos?

A. Yes.

Q. And Mr. Brannely?

A. Yes.

Q. Is that what caused you to change your story before the Court today?

Mr. Brannely. Just a moment. There is no indication this witness changed her story, and I ask your Honor to instruct the jury to disregard the purport of that question.

Mr. Seawell. I will withdraw the question and proceed with another question.

Q. Didn't you tell me, in the presence of Mr. Sanderson yesterday in my office, and in the presence of my stenographer that in your opinion Mr. Tony Legatos did not operate his business in a legal manner—

Mr. Brannely. Just a moment.

Mr. Seawell. Just a moment, let me finish my question.

Mr. Brannely. Your Honor—

The Court. Just a moment. There is the place (Indicating) not all around the court room.

Mr. Brannely. Yes, and I desire, your Honor, on behalf of my client, Mr. Legatos—

The Court. There is no reason to get exercised—

Mr. Brannely. —to object to that question on the ground it is improper redirect examination

and it is an attempt to cross-examine his own witness.

Mr. Seawell. That is correct, and I am laying the foundation for having been taken by surprise.

The Court. Overruled. Go ahead.

The Witness. Mr. Seawell, will you ask me the question again?

Mr. Seawell. Q. Didn't you tell me yesterday in my office in the presence of Miss Souza, my stenographer, and Mr. Sanderson, the agent in this case, and myself that Mr. Tony Legatos did not operate his bar in a lawful manner?

A. I didn't say that. I said in a very careless manner.

Q. And didn't you say he knew about the rum being put into these bottles, in your opinion?

A. Yes. I might have.

Mr. Brannely. Well, now, just a moment. Your Honor, I am going to make an objection to protect my client here. He says if in her opinion he knew the rum was put into those bottles. Your Honor, we certainly object to that as being an improper question.

The Court. There is no objection before the Court.

Mr. Brannely. Well, we are making the objection.

Mr. Seawell. Just a minute. May it please the court, Mr. Brannely asked this woman if in her opinion he operated these bars in a lawful manner. Now I am on redirect asking her if she didn't tell me yesterday that in her opinion Mr. Tony Legatos always knew about this rum going into bottles, because he told these men to force this rum and to get rid of it.

Q. Isn't that what you told me?

Mr. Brannely. Just a moment. Your Honor, I object—

The Witness. I said he said to push the rum and brandy sales.

Mr. Seawell. Q. And in your opinion he knew it was being mixed?

Mr. Brannely. Just a moment before you answer the question. We stand on the objection there; it is not a question of her opinion. That is immaterial, your Honor. She is testifying to facts, not what her opinion might be.

Mr. Seawell. That is right.

Mr. Brannely. And we object to it upon the ground her opinion is not testimony in this case and it is incompetent, irrelevant and immaterial. We stand upon that objection, your Honor.

Mr. Seawell. I would never have asked the question if you had not asked her if in her opinion—

Mr. Brannely. I didn't ask for any opinion.

Mr. Seawell. Let me finish. If in her opinion he ran the business in a lawful manner.

Mr. Brannely. I didn't ask for an opinion. I asked if she knew as a fact.

The Court. Proceed.

Mr. Seawell. That is all."

(Printed record, pages 177, 178 and 179.)

From the above testimony the government attorney was apparently trying to induce the jury to believe that the witness Mrs. Lewis had told an entirely different story on the witness stand than she had told the United States District Attorney in his office and to insinuate that Legatos through connivance had at-

tempted to have the woman change her testimony. The fact that the United States attorney asked questions which were left unanswered and left improper insinuations in the record implying that the defendant had acted improperly is amply supported by his closing argument to the jury. In his closing argument, he stated:

“He talks about Mrs. Lewis, why did Mrs. Lewis—Mrs. Lewis came here in answer to subpoena from my office and she says, ‘I was duty bound and Legatos was duty bound,’—I am not accusing Mr. Brannley, because I know he is a high type of attorney and I know he couldn’t do anything wrong, and he was perfectly within his rights to talk to her—not only Mr. Brannely talking to her, I talked to her, *and it wasn’t apparently the same story she told me before when she took the stand.*”

(Printed record, page 233.)

Berger v. United States, 295 U.S. 78, 79 L. ed. 1314, 55 S. Ct. 629, directly applies to the above improper character of examination and argument. Prejudice of a high degree was created against the defendant by the improper cross-examination and exaction of hearsay and opinion testimony as to the guilt of the defendant from the government’s own witness. Particularly prejudicial were the questions implying that the witness had changed her story at the behest of the defendant Legatos. It is submitted that under the rule of the *Berger* case, the testimony comes within the definition of “improper suggestions, insinuations, and especially, assertions of personal knowledge” designed

“to carry much weight against the accused when they are properly mere opinion”.

It is respectfully submitted that prejudicial error was committed in allowing such questions to be asked.

POINT 8.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE.

At close of testimony, defendant made a motion for judgment of acquittal and this was denied. (Printed record, page 215.)

A discussion of this would be identical with that under Point 9, at pages 51 to 62 of this brief, and reference is made to this discussion of Point 9 for consideration of Point 8.

POINT 9.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE TAKING OF TESTIMONY IN THE CASE.

Points 8, 9 and 12 in the Statement of points on which appellant intends to rely on appeal, relate to the sufficiency of the evidence to prove a criminal act under the first count of the indictment and as such they may be treated together.

Section 2871 of the Internal Revenue Code requires a willful violation to offend the section; Section

175.41 of Regulations 13 prohibits re-use for the packaging of distilled spirits or the additions of substance to the original contents of liquor bottles. The gist of the argument to follow is that as the record shows that Tony Legatos was not the actor in refilling bottles, he cannot be held liable for the acts of his employee, done without his knowledge or consent, and there was a total failure of evidence to prove either a criminal act or intent.

Pursuant to Rule 29 of the Federal Rules of Criminal Procedure at the close of the evidence offered by the government and at the close of taking of testimony, motions for judgment of acquittal were made on behalf of the defendant. These motions were denied. (Printed record, pages 183, 215.) Further, after the verdict of the jury and prior to sentence, pursuant to Rule 29(b), a written motion for a new trial was filed and in the alternative a renewal of the motion for acquittal. These motions likewise were denied. (Printed record, page 19.)

The instant case has several unusual features. First, no fraud on revenue was committed nor is it suggested—Chris Maritsas, the employee, testified, and the testimony is uncontradicted, that the rum that went into the whiskey bottles came from tax paid bottles. (Printed record, page 198.) The other peculiar fact is that the government contends ownership of an establishment automatically convicts the owner for any acts of refilling committed in the owner's establishment.

Unquestionably it is the theory of the government that an owner is liable for refilled bottles found on his premises—that it is not necessary to prove act or intent. The argument of counsel for the government makes it clear that it is the government's position that neither intent nor any act other than that of owning the premises was necessary to subject the defendant to the penalties of the statute.

In his argument to the jury, the United States attorney prosecuting the case stated:

“In other words, I think the Court will instruct you that even though I did not produce Mrs. Lewis and even though I could not directly connect this defendant with the crime, that if he owned the bar—he is the sole owner of the bar—he is licensed to carry on a business in this town, he is in a different position than the average business man, he is licensed by the United States Government and by the State of California to carry on a lawful business, and when you are licensed to carry on a licensed business, you owe a higher duty to the public generally. You are operating under a license and it is your duty to see that the business is carried on in a lawful manner.” (Printed record, pages 225, 226.)

Again in his closing argument on behalf of the government, counsel for the government stated to the jury:

“Mr. Brannely has discussed the law on this, and I would like to discuss it and I have read to you about what the law is about the proof of guilt in this case.

It is only necessary to prove this defendant owns and operates the place in question.”
(Printed record, page 230.)

This argument overlooks the elementary principle of criminal law that to prosecute a criminal offense there must be an overt act by the party charged. The point is so elementary only the barest authority is cited. (22 *C.J.S.* 95.)

Neither Section 2871 of the Statute, nor Section 175.41 of Regulations 13 makes the act of ownership criminal, it is the refilling of bottles for a particular purpose which is made unlawful.

In addition, the statute attaches criminality only to those who “willfully violate” the Section. Willfulness is a statutory factor in the establishment of guilt—a specific intent to violate the law.

In *Screws v. United States*, 325 U.S. 91, 89 L. ed. 1495, 65 S. Ct. 1031, the court said that “willful” is a word of many meanings whose construction is often influenced by the context in which it is used. As said by the court, at page 1502:

“We recently pointed out that ‘willful’ is a word of ‘many meanings, its construction often being influenced by its context’. *Spies v. United States*, 317 U.S. 492, 497, 87 L. ed. 418, 422, 63 S. Ct. 364. At times, as the Court held in *United States v. Murdock*, 290 U.S. 389, 394, 78 L. ed. 381, 384, 54 S. Ct. 223, the word denotes an act which is intentional rather than accidental. And see *United States v. Illinois C.R. Co.* 303 U.S. 299, 82 L. ed. 773, 58 S. Ct. 533. But ‘when used

in a criminal statute it generally means an act done with a bad purpose.' Id. 290 U.S. p. 394, 78 L. ed. 384, 54 S. Ct. 223. And see *Felton v. United States*, 96 U.S. 699, 24 L. ed. 875; *Potter v. United States*, 155 U.S. 438, 39 L. ed. 214, 15 S. Ct. 144; *Spurr v. United States*, 174 U.S. 728, 43 L. ed. 1150, 19 S. Ct. 812; *Hargrove v. United States* (CCA 5th) 67 F. (2d) 820, 90 ALR 1276. In that event something more is required than the doing of the act proscribed by the statute. Cf. *United States v. Balint*, 258 U.S. 250, 66 L. ed. 604, 42 S. Ct. 301. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. *Spurr v. United States*, supra (174 U.S. p. 734, 43 L. ed. 1152, 19 S. Ct. 812); *United States v. Murdock*, supra (290 U.S. p. 395, 78 L. ed. 385, 54 S. Ct. 223). And that issue must be submitted to the jury under appropriate instructions. *United States v. Ragen*, 314 U.S. 513, 524, 86 L. ed. 383, 390, 62 S. Ct. 374.

An analysis of the cases in which 'willfully' has been held to connote more than an act which is voluntary or intentional would not prove helpful as each turns on its own peculiar facts."

(89 U. S. 91, 101.)

So also in *Spies v. United States*, 317 U.S. 492, 87 L. ed. 418, 63 S. Ct. 364, the court held, where the defendant was indicted on a felony charge of "willful failure" to file a tax return and "willful failure" to pay taxes in an attempt to defeat and evade income taxes, that it was not sufficient to show that the act was merely voluntary and purposeful on the part of the taxpayer. It was necessary to show something

more—wilfullness as used in the statute included some element of “evil motive”.

Or, as said in *United States v. Murdock* (1933), 209 U.S. 389-398, 78 L. ed. 381, 54 S. Ct. 223:

“The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose. (*Felton v. United States*, 96 U.S. 699, 24 L. ed. 875; *Potter v. United States*, 155 U.S. 438, 39 L. ed. 214, 15 S. Ct. 144; *Spurr v. United States*, 174 U. S. 728, 43 L. ed. 1150, 19 S. Ct. 812); without justifiable excuse (*Felton v. United States*, *supra*; *Williams v. People*, 26 Colo. 272, 57 Pac. 701; *People v. Jewell*, 138 Mich. 620, 101 N.W. 835; *St. Louis I.M. & S.R. Co. v. Batesville & W. Teleph. Co.* 80 Ark. 499, 97 S.W. 660; *Clay v. State*, 52 Tex. Crim. Rep. 555, 107 S.W. 1129); stubbornly, obstinately, perversely, *Wales v. Miner*, 89 Ind. 118, 127; *Lynch v. Com.* 131 Va. 762, 109 S.E. 427; *Claus v. Chicago G.W.R. Co.* 136 Iowa, 7, 111 N.W. 15; *State v. Harwell*, 129 N.C. 550, 40 S.E. 48. The word is also employed to characterize a thing done without ground for believing it is lawful. (*Roby v. Newton*, 121 Ga. 679, 49 S.E. 694, 68 L.R.A. 601), or conduct marked by careless disregard whether or not one has the right so to act, *United States v. Philadelphia & R.R. Co.* (D.C.) 223 Fed. 207, 210; *State v. Sayre*, 129 Iowa, 122, 105 N.W. 387, 3 LRA (N.S.) 455, 113 Am. St. Rep. 452; *State v. Morgan*, 136 N.C. 628, 48 S.E. 670.” (290 U.S. 389, 394, 78 L. ed. 381, 385.)”

Thus the decisions compel a construction of Section 2871 of the Internal Revenue Code that there can only be a violation when the defendant commits the acts condemned by the rule with the evil motive of violating the section and the purpose for which it was enacted. In other words, that bottles were re-filled with the intent to deprive the government of revenue.

As to the purpose of the statute, this may be gathered from *United States v. Bardenheir* (1892), 49 Fed. 873, where the court construed Section 3226 Revised Statutes, now Section 2868 of the Internal Revenue Code, and held an indictment fatally defective charging a use of cask or packages for the sale of spirits of a different quality from those contained in them at the time of the inspection, without alleging the cause of the change: "It is apparent that Congress was legislating for the protection of the revenue, rather than merely the prevention of private wrongs". See also *Three Packages Distilled Spirits* (D.C. N.Y. 1882), 14 Fed. 569.

In the instant case therefore, it is proper to interpret the word "willful" in Section 2871 to require proof of the evil motive to defraud the government of revenue along with proof of the act. Such a determination is not necessary in this appeal for the reason that the *minimum* meaning of willful in any statute, according to all adjudicated cases, is that it connotes and requires an intentional and purposeful act, and unless such an act is shown there can be no criminality.

No employer is liable for the criminal acts of his employee in the absence of proof that the employer participated in, consented to or had knowledge of the acts.

In the instant case, the government's basic contention was that the same rule applies in criminal law as applies in civil law, i.e., a principal is bound by the acts of his employee or agent performed within the scope of the employee's or agent's authority. But this is a rule of civil liability only and is not part of the criminal law.

The entire matter and all of the applicable authorities were cited and discussed by District Court Judge Yankwich in an exhaustive analysis in the case of *United States v. Food and Grocery Bureau of Southern California* (1942), 43 Fed. Supp. 966. In the *Food and Grocery* case, the court held that as a matter of law certain defendants were not criminally liable for the acts of an agent for want of proof of direct authorization by the principal, irrespective of the fact that the agent may have been acting within the scope of his employment. The court, in analyzing the authorities and the applicable law, at page 971 of 43 Fed. Supp., said:

“Another principle of law to which I adverted during the early stages of the case was the criminal responsibility of a principal for the acts of his agent. I quote from my opinion in *People v. Armentrout*, 1931, 118 Cal. App. Supp. 761, 1 P. 2d 556, 561: ‘A principal, in order to be held criminally liable, must be shown to have knowingly

or intentionally aided, advised, or encouraged the criminal act committed by the agent.' People v. Doble, 203 Cal. 510, 511, 265 P. 184. 'Before one can be convicted of a crime by reason of the acts of his agent, a clear case must be shown. The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law.' People v. Green, 22 Cal. App. 45, 50, 133 P. 334. * * * Only when the principal aids, abets, commands, or assents to the criminal act can he be held responsible for a crime of which intent is an essential ingredient which is not supplied by law or implied from the doing of the act. * * * Strictly speaking, there can be no ratification of a criminal act in which a specific intent is necessary. 'He (the principal) must be liable, if at all, at the time the act is done.' Clark & Marshall on Crimes (3d Ed.) Sec. 194, p. 255. 'He only is criminally punishable who *immediately* does the act, or *permits it* to be done.' Rex v. Huggins, *supra*, at p. 1580 of 2 Ld. Raymond.'

In Nobile v. United States, 3 Cir., 1922, 284 F. 253, 255, the Court said: 'Criminal liability of a principal or master for the act of his agent or servant does not extend so far as his civil liability. *He cannot be held criminally for the acts of his agent, contrary to his orders, and without authority, express or implied, merely because it is in the course of his business and within the scope of the agent's employment, though he might be liable civilly.*' (Italics added by Judge Yankwich.)

And thus Paschen v. United States, 7 Cir., 1924, 70 F. 2d 491, 503: '* * * civilly one is

responsible for the acts and doings of his accredited agent acting within the scope of his authority, while one may be criminally liable only in case he intentionally does that which the law denounces and penalizes. *Nobile v. United States* (3 Cir.), 284 F. 253.' "

The above case states the universal rule on criminal liability where a specific intent is required to the completion of the criminal act. In these cases, "Unless there be command, direction, or consent by the principal, he commits no offense." (*Paschen v. United States*, *supra*.)

In the instant case there was a total failure of proof, and, apparently the government concedes that Tony Legatos committed no act of refilling. Likewise there is a total failure to prove that the defendant Legatos had any knowledge of the acts of his employee or that he consented thereto or participated in any way in any act of refilling, there being no act on the part of the defendant Legatos and there being no conduct on his part from which it could be implied that he commanded, directed or consented to the act of his employee Maritsas. The proof is to the contrary and the testimony clear and unequivocal that Legatos had no knowledge.

There is the positive testimony of Maritsas that defendant Legatos knew nothing of any refilling. (Printed record, page 202); Legatos testified he knew nothing about it. (Printed record, page 205.) The only attempt made by the government to connect Legatos

with the refilling (other than ownership) was proof of a conversation he had on February 1, 1945 (five months before the offense) that in one establishment he had forty or fifty cases of rum and he intended to send it to his other establishments and ask each of his managers "to press it in their sales". (Printed record, page 171.) But this conduct is consistent with innocence; the defendant would not be a businessman if he did not adapt his sales practices to his inventories.

Again there is the highly prejudicial hearsay testimony of the government witness Laverne Lewis, that in a conversation with the prosecuting attorney, *she might have said that in her opinion* Legatos knew that rum was put into the bottles. (Printed record, page 178.) But this was not testimony, this was separate grounds of error. Such rank hearsay of an "opinion" cannot be given the dignity of testimony in a case wherein the defendant's liberty was at stake.

There being a total failure of proof and the motions for judgment of acquittal being timely made under Rule 29, the defendant was entitled to have such motions granted. *Hammond v. United States* (D.C. Appeals, 1942), 127 F. (2d) 752, unequivocally sets forth the rule of law as to the rights of the defendant and the duty of the court where there is insufficient evidence to overturn the legal presumption of innocence. The court said:

"In the present case, there was, as there always is in a criminal prosecution, a legal presumption that appellant was innocent until proved

guilty beyond a reasonable doubt. 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the Appellate Court to reverse a judgment against him'."

The mere fact that the circumstance of ownership might give reason to suspect the defendant Legatos of complicity is not sufficient evidence to convict.

"Circumstances which merely raise supposition or give room for conjecture are not sufficient evidence of guilt. Wharton on Evidence, page 1532. 'A conviction resting on them alone cannot stand.' *Kassen v. United States*, 87 Fed. 2d 183, 184."

Dennert v. United States (CCA 6th, 1945), 147 Fed. (2d) 286.

The entire record in the case, read in the light most favorable to the Government, failing to show the commission of a criminal act required that the court at the conclusion of the taking of testimony should have granted defendant's motions for judgment of acquittal.

POINT 10b.

THE COURT ERRED BY INSTRUCTING THE JURY THAT SECTION 2871 OF THE INTERNAL REVENUE CODE REQUIRED NO INTENT TO CONSTITUTE A VIOLATION.

The instruction was:

“You are instructed that the offense charged in this indictment as against Tony Legatos is of that class in which it is not necessary to prove guilty intent. This defendant, being engaged in the business of selling distilled spirits which had been bottled while in bond, whether he conducted it by himself or his agent, was bound at his peril to see that there was no re-use of any bottle for the purpose of containing distilled spirits, which had once been filled and stamped under the provisions of the Act in question, without removing and destroying the stamp previously affixed to such bottle. If the bottles in question were re-filled, they have been re-used. Agents of the defendant Tony Legatos, if one of them acting—I will go over this again.

If the bottles in question were refilled, they have been re-used. If one of the agents of the defendant Tony Legatos, acting within the scope of his employment, re-used the bottle without removing and destroying the stamp, then this defendant's liability is the same as if he had re-used it himself.”

The instruction appears three times in the printed record, at pages 256, 264 and 265.

Objections to the instruction appear at pages 262, 263, 267 and 268 of the printed record.

The above point also covers Point 10c, which is set out in the Statement of Points on which defendant intends to rely on Appeal and is worded:

“The court erred by instructing the jury that irrespective of the lack of knowledge of the employer, the defendant could be held criminally liable for the acts of his employee.”

It is the same instruction.

Section 2871 of the Internal Revenue Code prohibits “willful violations”. The preceding discussion on the sufficiency of the evidence set out the authorities on the necessity of a specific act and a specific intent under this statute where “willfullness” is made an ingredient of the crime. In the same portion of the argument the authorities were reviewed to the effect that an employer is not liable criminally for the acts of his employee in the absence of a showing that the employer participated in, consented to or had knowledge of the acts. Also, it was made evident that the theory of the government’s case, making mere ownership of an establishment where liquor bottles were refilled a criminal act, was false.

All of the above authorities and the discussion presenting them is equally pertinent to the point of error in the instructions to the jury. For, in the instructions to the jury, and the refusal of instructions, the theory of the government, that guilt is founded on ownership, culminated as the law of the case. The giving of the questioned instruction and the manner of giving it compelled the jury to render a verdict against the de-

fendant. The discussion as to the legal meaning of willfulness in a statute will not be repeated—neither will the authorities to the effect that the doctrine of *respondeat superior* has no place in criminal law. Suffice it to state the discussion of these points under the argument on the insufficiency of the evidence to prove a violation makes it patent that the instruction given by the court that it was not necessary to prove guilty intent was error. The argument under this head will restrict itself to the origin of the instruction and the error present in the manner of giving it to the jury.

The instruction given by the court is lifted bodily from the case of *In re Guthrie* (Dist. Ct. Ohio, 1909), 171 Fed. 528 and consists in *part* of an instruction given by the trial judge to a jury.

The essential portion of the instruction given in the *Guthrie* case, omitted in the Legatos case is:

“The question has arisen: Is it necessary on the part of the government, in order to convict, to show that the defendant knowingly and willfully reused the bottle? On that point I charge you that: The clause of the statute under which the indictment is laid does not make the criminality of the act forbidden to depend upon its being knowingly or willfully done, and the government is not therefore required to prove that he reused a bottle knowingly and willfully.” (171 Fed. 528, 531.)

The court in the *Guthrie* case was correct on the statute, Section 6 of the Act of March 3, 1897, Chapter

379, 29 Stat. 627. The clause involved in the *Guthrie* case did not require that the violation be willful. That is sufficient distinction to prohibit the language of the *Guthrie* case ever being used as an instruction where the statute requires "willfullness" as an essential element of the offense.

Not only the wording of the instruction, but the manner in which it was given and its repetition were prejudicial to the defendant, and left the jury no possibility of doing anything except to bring in a verdict against the defendant Legatos.

The trial of the case occupied three days. The jury on the fourth day were instructed, and at 10:46 A.M. retired for the purpose of considering the verdict. (Printed record, page 263.) At 2:10 P.M., the jury returned to the courtroom and the Foreman handed the following writing to the judge:

"Judge Welsh. Your instruction to the jury with reference to the responsibility of an employer for the acts of employee is not clear to all of the jurors.

Respectfully, N. M. Sellers, Foreman."

(Printed record, page 264).

Without further proceedings, the court reread to the jury the identical instruction previously given that "as against Tony Legatos * * * it is not necessary to prove guilty intent", and that Tony Legatos was bound at his peril for the acts of his employee.

The jury retired at 2:15 P.M. and again returned at 4:55 P.M. (Printed record, page 264.)

The Foreman then presented a second note to the judge. The proceedings are taken from the record:

“The Court. There was presented to me the following:

‘Judge Welsh. We previously asked you can an employer be held responsible for the acts of an employee. Your answer was that an employer can be held responsible for the acts of an employee. We now wish to ask is an employer responsible for the acts of an employee, even if the employee violates the law against the knowledge and consent of the employer?’

Respectfully, N. M. Sellers, Foreman.’

Mr. Foreman, will you please state numerically, without divulging which way either for conviction or acquittal, how you now stand?

Juror Sellers. We stand eleven to one, your Honor.

The Court. The answer is this * * *’ (Printed record, page 265.)

The court thereupon reread the same instruction as had twice previously been given. After reading the instructions the following proceedings are shown of record:

“Mr. Brannely. Your Honor, at this time—

Mr. Seawell. Just a moment, any motion?

The Court. Denied. You may now retire.

(The jury commenced to retire from the court room.)

Mr. Brannely. Your Honor—

Mr. Seawell. Just a moment—

The Court. Wait a minute do you understand?

(The jury retired from the court room.)

The Court. Now what do you wish to say?"

(Printed record, page 266.)

After being permitted to address the court, counsel for the defendant stated their objections to the instruction as given; that the jury must find intent. The response of the court to the objection of counsel was: "Let it stand as it is". (Printed record, pages 266-268.) The jury after being out approximately ten minutes, returned with a verdict of guilty on the First Count. (Printed record, page 268.)

The confusion of the jury on the questions of intent and the liability of an employer for the acts of his employee was so apparent from the jury's queries the only conclusion possible is that the instruction repeated by the court was decisive of the case and amounted to a direction to the jury to return a verdict of guilty against the defendant.

The case in its procedural aspects, with the circumstance of the jury coming into the court for instructions, the court plainly hinting that a verdict should be forthcoming, so closely parallels *Bollenbach v. United States* (January 28, 1946), 326 U. S., 66 S. Ct. 402, 90 L. ed. (Adv.) 318, as to be on all fours with it.

The *Bollenbach* case involved an indictment for violating the National Stolen Property Act charging in two counts a known transportation in Interstate Commerce of stolen securities and a conspiracy to commit the offense. At the trial of the case it was proved that the securities were stolen in Minneapolis and the de-

fendant helped to dispose of them in New York City. The introduction of evidence took seven days, and after the jury had been out seven hours it reported to the court that it was "hopelessly deadlocked". Some comments were exchanged between the court and the jury, in which one of the jurors asked if an act of conspiracy could be performed after the crime had been committed. The answer of the judge was unresponsive. The jury then retired, but returned in twenty minutes for further instructions. This time the jury passed the court a written note asking if the defendant had knowledge that the bonds were stolen, would such knowledge make him guilty on the second count. In reply the court gave the jury an instruction which included a statement to the effect that possessing stolen property in another State after the theft raises a presumption that the possessor was the thief. Counsel for the defendant excepted to this charge, but was cut short by the judge with the remark: "You may except to the charge, but I will not take any requests". (90 L. ed. (Advance) 320.)

Following that instruction the jury was out for only five minutes before returning with a verdict of guilty on the conspiracy count.

After discussing the error in an instruction which permits the jury to presume a theft, the opinion of the Supreme Court states:

"In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.

Quercia v. United States, 289 U. S. 466, 469, 77 L. ed. 1321, 1324, 53 S. Ct. 698. The influence of the trial judge on the jury is necessarily and properly of great weight, *Starr v. United States*, 153 U. S. 614, 626, 38 L. ed. 841, 845, 14 S. Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. *If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.*

An experienced trial judge should have realized that such a long wrangle in the jury room as occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home, and escape overnight detention, particularly in view of a plain hint from the judge that a verdict ought to be forthcoming. The jury was obviously in doubt as to Bollenbach's participation in the theft of the securities in Minneapolis and their transportation to New York. The jury's questions, and particularly the last written inquiry in reply to which the untenable 'presumption' was given, clearly indicated that the jurors were confused concerning the relation of disposing of stolen securities after their interstate journey had ended to the charge of conspiring to transport such securities. Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties, a trial judge should clear

them away with concrete accuracy. In any event, therefore, the trial judge had no business to be 'quite cursory' in the circumstances in which the jury here asked for supplemental instruction. But he was not even 'cursorily' accurate. He was simply wrong." (90 L. ed. (Adv.) 321. Italics added.)

Two other cases in the last term of the Supreme Court follow the decision of the *Bollenbach* case. These are *M. Kraus & Bros. v. United States* (March 25, 1946), 326 U. S. —, 90 L. ed. (Adv.) 653, 66 S. Ct. 705, and *Bihn v. United States* (S. Ct. June 10, 1946), 14 Law Weekly 4449, 90 L. Ed. (Adv.) 1208.

In the *Kraus* case the court was concerned with a conviction for alleged violation of O.P.A. regulations through a practice of requiring purchasers of dressed poultry to buy chicken skins and chicken feet with the poultry. Among other instructions given by the court to the jury was one in which the court advised the jury that the "one question in the case was whether the sale of chicken skin and feet was a necessary condition to the purchase of the other (poultry)".

The Supreme Court held that the regulations involved had to be interpreted strictly and so interpreted did not prohibit a tie-in sale, making the instruction erroneous. However, other instructions given by the trial court did properly interpret the regulation. Nevertheless, the Supreme Court held that the specific instruction constituted irreparable error and that the correct general instructions did not cure the defect. The opinion states:

“While such statements (the proper instructions) tended to charge a violation of Section 1429.5, as properly interpreted, they were so intertwined with the incorrect charge as to negative their effect. ‘A conviction ought not to rest upon equivocal direction to the jury on the basic issue’. *Bollenbach v. United States*, 326 U. S. —, 90 L. Ed. (Adv.) 318, 66 S. Ct. 402”. (90 L. Ed. (Adv.) 653, 659.)

The other decision and the most recent is *Bihn v. United States*, handed down on June 10, 1946. There the court held that an erroneous instruction on a basic issue of fact could not be cured by the “harmless error” statute.

“Instructions to acquit, if there was reasonable doubt as to the petitioner’s guilt, were given in other parts of the charge. Those were general instructions. They would be adequate, standing alone. But on the crucial issue of the trial—whether petitioner or one of four other persons stole the coupons from the bank—no such qualification was made; and the question was so put as to suggest a different standard of guilt. As stated by Judge Frank in his dissenting opinion below: * * * So interpreted, this charge erred by putting on appellant the burden of proving her innocence by proving the identity of some other person as the thief. Or to put the matter another way, the instruction sounds more like comment of a zealous prosecutor rather than an instruction by a judge who has special responsibilities for assuring fair trials of those accused of crime. See *Quercia v. United States*, 289 U. S. 466, 469.

The 'harmless error' statute (Judicial Code, Sec. 269, 28 U. S. C. Sec. 391) means that a criminal appeal should not be turned into a quest for error. It does not mean that portions of the charge are to be read in isolation to the full charge and magnified out of all proportion to their likely importance at the trial. *Boyd v. United States*, 271 U. S. 104, 107. Yet as stated in *McCandless v. United States*, 298 U. S. 342, 347-348, 'an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial.' It seems plain that the inflection or tone of voice used in giving the challenged instruction could make it highly damaging. And in any event the probabilities of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we conclude that prejudicial error was committed. We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears. While there was sufficient evidence for the jury, the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial, and hence treat it as a minor aberration of trivial consequence. Nor it is enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See *Bollenbach v. United States*, 327 U. S." (14 L. Ed. 4449; 90 L. Ed. (Adv.) 1211-1212.)

Of the instant case it cannot be said as in the *Bihn* case, "while there was sufficient evidence for the jury, the case against the petitioner was not open and shut". So far as Legatos is concerned, the case was closed in Legatos' favor at the conclusion of the taking of testimony, except for the misconception of the prosecution followed by the court that Legatos "was bound at his peril".

The court's failure to give the instructions on intent proposed by the defendant constituted serious error. The court's incorrect instruction on the one vital issue was the opening of the case against Legatos. The repetition of the instruction on two separate occasions (apparently against the common sense judgment of the jurors) effectively shut the case against Legatos and was so fatal as to deprive him of a fair trial.

POINT 10c.

THE COURT ERRED BY INSTRUCTING THE JURY THAT IRRESPECTIVE OF THE LACK OF KNOWLEDGE OF DEFENDANT AS AN EMPLOYER, THE DEFENDANT COULD BE HELD CRIMINALLY LIABLE FOR THE ACTS OF HIS EMPLOYEE.

The instruction involved is the same as that considered under the discussion in Point 10b.

POINT 11a.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THE JURY, IN ORDER TO FIND THE DEFENDANT GUILTY UNDER THE FIRST COUNT, MUST FIND THAT THE DEFENDANT WILLFULLY VIOLATED SECTION 175.41 OF REGULATIONS 13.

The discussion under Point 10b contains the applicable authority that the jury were entitled to instructions that in order to violate Section 2871 of the Internal Revenue Code and Section 175.41 of Regulations 13, they must find that the defendant acted willfully in violation of the section and the law and the rules. The entire discussion is applicable to Instruction No. 4, which was proposed by the defendant and was refused. The instruction as it appears at page 237 of the printed record was as follows:

“Before either defendant may be found guilty under the First Count of the Indictment, it is necessary that you find beyond all reasonable doubt that he ‘willfully violated’ the regulations involved. Willfullness is made a vital ingredient of the crime by statute, and this means that the defendant must have had a knowledge and a purpose to do wrong.”

Objection to the failure to give this instruction appears at page 260 of the printed record. It is to be observed, in connection with the discussion under Point 10b that the entire discussion is applicable to the refusal of the court to give proposed instruction No. 4.

POINT 11c.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT AN EMPLOYER WAS NOT CRIMINALLY RESPONSIBLE FOR THE ACTS OF HIS EMPLOYEE UNLESS THE EMPLOYER AUTHORIZES SUCH ACTS.

The defendant's Proposed Instruction No. 10, which appears at pages 239 and 240 of the printed record, was as follows:

“You may not presume that other persons, even though they were employees, had authority to do a criminal act on behalf of either defendants, and if you find that some or all of the bottles described in the First Count of the Indictment were reused in violation of regulations, but do not find that both of the defendants personally reused the bottle or bottles, then as to each defendant who did personally not reuse any bottles unless you find beyond all reasonable doubt that he directly authorized or consented to the reuse in violation of regulations, it is your duty to acquit him under the First Count of the Indictment.”

The entire argument under Point 10b is pertinent to the above instruction and demonstrates that defendant's Proposed Instruction No. 10 was a correct statement of the law and one which the defendant was entitled to have read to the jury. As demonstrated under the discussion under Point 10b, the court and the government followed a theory of the law diametrically opposed to the law as stated in Instruction No. 10, resulting in the judge's failure to give the instruction, and thus committing prejudicial error in giving an erroneous instruction and refusing to give a proper one.

No specific objection was made for failure to give defendant's proposed Instruction No. 10, but objection to the whole character of instruction on intent appears at pages 266 to 268 of the printed record.

POINT 12.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL, OR IN THE ALTERNATIVE, A JUDGMENT OF ACQUITTAL.

The same argument that was advanced under Point 8 is applicable to Point 12. The court's error in refusing to grant defendant's motion at the close of the taking of testimony in the case, was repeated by the failure of the court to grant a new trial or, in the alternative, a motion for judgment of acquittal after the jury had returned its verdict.

The written motion was filed and appears at pages 16 to 18 of the printed record, and the denial of the motion appears at page 19 of the printed record. The discussion under Point 8 is incorporated in this Point for all purposes of argument.

CONCLUSION.

Defendant stands convicted of violating a revenue statute and has been given the maximum sentence. Yet no suggestion is made that he or any of his employees contemplated defrauding the government of revenue, and there is no evidence that defendant himself did any act in violation of the statute or the regulations

promulgated under it. This conviction should be reversed and defendant's motion for acquittal granted, because:

(a) The count of the indictment upon which defendant was convicted does not state an offense against the United States;

(b) The court incorrectly instructed the jury as to the law under which it must reach its verdict;

(c) The evidence introduced against defendant was obtained by an unlawful search and seizure;

(d) There were prejudicial errors in the admission of testimony, especially the admission of testimony as to an alleged opinion expressed privately by a government witness to the prosecuting attorney.

Dated, Sacramento, California,
August 7, 1946.

Respectfully submitted,

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No. 11,307

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

TONY LEGATOS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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No. 11,307

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TONY LEGATOS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The facts in this case as developed by the testimony are as follows: The appellant owns some sixteen or seventeen restaurants and bars in and around the City of Sacramento, including the Golden Tavern Bar located at 621 "K" Street, Sacramento. (See Printed Record, pages 35, 205.)

On the morning of July 18, 1945, at approximately 10:00 A.M. two inspectors from the Alcohol Tax Unit, Internal Revenue Service, Treasury Department, visited the premises of the Golden Tavern Bar for the purpose of making a routine inspection. When the inspectors entered the bar the doors were open and there were a number of people sitting in the bar drinking. The inspectors approached the bartender

on duty, one Tommie O'Leary and presented their official credentials. The inspectors then proceeded back of the bar and removed therefrom approximately forty bottles of liquor which they took to a rear booth in the establishment for inspection. The inspectors then tested the various bottles in order to ascertain if the bottles contained the ingredients which the labels on the outside of the bottles alleged them to contain. The test that the inspectors used is known as the Williams Alcohol Test. The inspectors had what is known as a Williams Test Set with them which came from the chemical laboratory of the Bureau of Internal Revenue, San Francisco, California,

At approximately 10:20 A.M. while the inspectors were making their tests of the contents of the bottles in question, one Mr. Nick Tiodoritus, came into the bar. Mr. Tiodoritus was later identified as an employee of appellant. No one at any time made any objection whatsoever to the inspection being conducted by the inspectors. After the inspectors had completed their tests they removed thirty-one bottles and their contents from the premises, and these thirty-one bottles and contents were introduced into evidence as Government exhibits Nos. 1-31 inclusive.

After the inspectors seized the bottles in question they were turned over to Dr. R. F. Love who has been a chemist with the Internal Revenue Bureau for the past twenty-seven years. Dr. Love testified that he made an examination of the contents of the government exhibits Nos. 1-31 inclusive, and found that each and every bottle contained a substance

other than that indicated by the labels on the bottles, in other words, that the bottles had all been refilled. (R. pages 114 to 168, inclusive.)

The defendant was indicted in an indictment containing two counts, for refilling and reusing liquor bottles, the first count being based on Section 2871 and the second count on Section 2803, Internal Revenue Code. Section 2871 makes knowledge and wilfulness an element of the crime, but Section 2803 does not. The Court gave a general instruction, applicable to both counts, that the case was one in which it was not necessary to prove guilty intent, but that the offense was committed in that the defendant or his employees refilled and reused bottles, whether wilfully and knowingly done or not. The instruction as given was based on the case of *United States v. Guthrie*, 171 Fed. 528. We submit that the instruction was proper with respect to Section 2803, since it makes no reference to the act being knowingly and wilfully done. However, the defendant was acquitted on that count. The instruction is attacked with respect to the first count, on which the defendant was convicted, because Section 2871, on which the count was based, makes knowledge and wilfulness essential elements of the crime.

ARGUMENT.

There appears to be no doubt from the evidence that the acts of the employees were wilfully and knowingly done. It might be argued that these acts were the acts of the appellant and that therefore he was not preju-

diced by the instructions. The appellant contends that under the evidence in the case these acts cannot be imputed to him in a criminal prosecution. This is true, at least with respect to an offense involving moral turpitude. The question is whether it applies to the statute here involved which is designed to protect the revenue and control the liquor traffic. A statute may denounce acts not in themselves wrong. In *United States v. Illinois Central R. Co.*, 303 U. S. 239, which cites *United States v. Murdock*, 209 U. S. 389, referred to on page 56 of the appellant's brief, the Court pointed out that with respect to statutes denouncing offenses of the nature here involved "wilfully" may mean "conduct marked by careless disregard whether or not one has the right so to act". It may mean plain indifference to the requirements of the statute. In that case the railroad company, although it made every effort to comply with the requirements of the 28-Hour Law, was held responsible for the negligence of its employees. It may be said that the railroad company, being a corporation, could act only through employees. The same is more or less true here. The defendant operated a number of taverns and had to conduct his business through employees. The material evidence against the defendant is that he gave instructions to his employees to push the sale of rum. This they did by using it in refilling bottles. In this sense he was responsible for their acts, which were wilfully done. In view of the nature of the business in which he was engaged, it was his duty, as pointed out in the *Guthrie* case, *supra*,

page 531, to see that the business was legally conducted. He, at least, profited by the violation.

The *Illinois Central* case, *supra*, was followed in *Arrow Distilleries, Inc. v. Alexander*, 109 F. (2d) 397, 406 (CCA 7th), a case involving a violation of the Federal Alcohol Administration Act, in which the Court pointed out that the purpose of the statute is material in the determination of the meaning of the word "wilfully".

The recent case of *Meyer Eastman, et al. v. United States*, 153 F. (2d) 80 (CCA 8th), in which the defendants were convicted of carrying on the business of wholesalers without complying with the Federal Alcohol Administration Act and the internal revenue laws, is not greatly unlike the case before this Court.

CONCLUSION.

We respectfully submit that the judgment be affirmed.

Dated, San Francisco, California,

May 7, 1947.

FRANK J. HENNESSY,

United States Attorney,

EMMET J. SEAWELL,

Assistant United States Attorney,

Attorneys for Appellee.

No. 11311

United States
Circuit Court of Appeals
For the Ninth Circuit.

RAILWAY MAIL ASSOCIATION,
a corporation,

Appellant,

VS.

JENNIE M. BABBITT,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington
Northern Division

FILED

JUN 7 - 1946

PAUL P. O'BRIEN,

CLERK

No. 11311

United States
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NAMES AND ADDRESSES OF COUNSEL

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and

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Seattle, Washington.

Attorneys for Appellee:

LUNDIN & BARTO,
2202-5 Smith Tower,
Seattle, Washington,
and

ANTHONY SAVAGE,
955 Dexter Horton Building,
Seattle, Washington. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of
Washington for King County

No. 352679

JENNIE M. BABBITT,

Plaintiff,

vs.

RAILWAY MAIL ASSOCIATION, a corporation,
Defendant.

COMPLAINT

For cause of action against the defendant, plaintiff complains and alleges:

I.

The plaintiff, residing at Seattle, King County, Washington, is the widow of Fred I. Babbitt, who died in Seattle, Washington on July 30, 1943.

II.

The defendant is a corporation, incorporated under the laws of New Hampshire, maintaining a so-called "Seattle Branch," and doing business in Seattle, King County, Washington, of which G. K. Chaplin, residing at Seattle, is president.

III.

On February 1, 1924, while the said Fred I. Babbitt, residing at Seattle, was a Railway Postal Clerk in the Railway Mail Service of the United States, for a valuable consideration, the defendant, of which the said Fred I. Babbitt was a member,

issued to Fred I. Babbitt its Beneficiary Department Certificate No. 6057 which provided that if the member named in the certificate shall receive bodily injuries during the continuance of the certificate through external, violent and accidental means not the results of his own vicious, or intemperate conduct, which shall wholly and continuously disable him from following the occupation of a Railway Postal Clerk in the Railway Mail Service of the United States, he shall be entitled to receive from said Benefit Fund in the following manner, to-wit: * * * *

4. If death shall result from such injuries alone within one year from the date of the injury, the Association will pay [6] \$4,000.00 * * * to Jennie M. Babbitt, his wife, and the certificate further provided that accidental death shall be construed to be either sudden or violent death from external, violent and accidental means, resulting directly, independently and exclusively of any other causes, and not the direct or indirect result of the member's own vicious or unlawful conduct; or death within one year, as the sole result of accidental means alone, and there shall be no liability whatever when disease, defect or bodily infirmity is a contributing cause of death.

IV.

Because Fred I. Babbitt became afflicted with multiple sclerosis, and being physically unable to perform the duties of a Railway Postal Clerk, on July 31, 1938, the said Fred I. Babbitt was retired

as a Railway Postal Clerk, and the said Fred I. Babbitt ever since July 31, 1928, and until his death, was wholly and continuously disabled from following the occupation of a Railway Postal Clerk in the Railway Mail Service of the United States because of his physical condition and the multiple sclerosis he was afflicted with, as the defendant and its officer on July 31, 1928, and at all times since then well knew.

V.

In order to keep the said Beneficiary Certificate in full force and effect the said Fred I. Babbitt from July 31, 1928, was obligated to and did pay the defendant the sum of \$1.50 per month, making the payments every two months, and in addition thereto paid certain special assessments from the date of the issuance of said certificate until the date of his death, which payments of the defendant and its officer received and accepted since July 31, 1928, well knowing that Fred I. Babbitt was physically unable to perform the duties of a Railway Postal Clerk.

VI.

By accepting the said payments hereinbefore mentioned from the said Fred I. Babbitt since July 31, 1928, the defendant modified the agreement between the parties and waived the provisions that the bodily injuries received shall wholly and continuously [7] disable him from following the occupation of a Railway Postal Clerk in the Railway Mail Service of the United States, and also modified the agreement and waived the provision that

the accidental death as therein defined shall be independently and exclusively of any other causes, and that there shall be no liability whatsoever when disease if defect or bodily infirmity is a contributing cause of death, for the reason that the defendant well knew at all times since July 31, 1928, that Fred I. Babbitt was suffering with a physical affliction to the extent that he was unable to perform the duties of a Railway Postal Clerk.

VII.

On June 9, 1943, at about 7:15 a.m., the said Fred I. Babbitt slipped on a rug in his home at 4116 Corliss Avenue, Seattle, Washington, fell, fracturing his left hip, which caused a fat embolus to his lungs and brain, and he died on July 30, 1943, the cause of his death being due to the fracture occasioned by the accident of his falling as hereinabove stated, and his death did result from said injuries through external, violent and accidental means, not the result of his own vicious or intemperate conduct.

VIII.

Within sixty days after the death of Fred I. Babbitt, the plaintiff, as beneficiary under the said certificate, notified G. K. Chaplin, the branch president of the defendant, of the death of Fred I. Babbitt, and filed her proof of claim on the forms provided by the defendant, which the Committee of Claims of the defendant disallowed. Thereupon the plaintiff appealed to the National Executive Committee of the defendant, and on October 21, 1943,

by a vote of seventeen to two, the defendant rejected the claim of the plaintiff and so advised her.

IX.

The full sum of \$4,000.00, with interest at 6% from July 30, 1943, is due and owing from the defendant to the plaintiff.

Wherefore, plaintiff demands judgment against the defendant [8] in the sum of \$4,000.00, with interest at 6% from July 30, 1943.

LUNDIN & BARTO,
Attorneys for Plaintiff.

(Duly verified.)

[Endorsed]: Filed May 1, 1944. [9]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

To the Honorable Presiding Judge of the Superior
Court of the State of Washington, for King
County:

The defendant in the above entitled action Petitions and shows to this Court as follows:

I.

That the above entitled action was commenced against it in the above entitled Court by the purported service of Summons and Complaint upon G. K. Chaplin, on May 5, 1944, and that the time within which this defendant is required by the Laws

of the State of Washington, and the Rules of the Superior Court to Answer or Plead to the Complaint herein has not expired.

II.

The said action involves a controversy which is wholly between the citizens of different states. At the time of the commencement of this action, the plaintiff herein was and at all times since has been and still is a resident and citizen of the State of Washington, and a resident and citizen of the Western District of Washington, and she has not at any of said times, nor is she now a resident or citizen of the State of New Hampshire.

III.

During all the times mentioned in plaintiff's Complaint and at the time of the commencement of this action and all times since then, the defendant Railway Mail Association was and is now an association organized and existing under and by virtue of the Laws of the State of New Hampshire, and having its principal [10] place of business at Portsmouth, in said State, and is a citizen and resident of said State and it was not at any of said times, and is not now a resident or citizen of the State of Washington, or of the Western District of Washington.

IV.

The above entitled action is a controversy between the plaintiff and the defendant and that the said action or suit is of a civil nature, to-wit:

An action by the plaintiff to recover upon one

of its Beneficiary Department Certificates in the amount of \$4,000.00 payable upon the terms and conditions set out therein to the plaintiff in the event of the accidental death of Fred I. Babbitt as provided in the said Certificate, and that the matter in controversy in this suit or action at the time of the commencement thereof and now exceeds the sum of \$3,000.00 exclusive of interest and costs as appears from the allegations of the plaintiff's Complaint.

V.

This Defendant, the Railway Mail Association has given the Plaintiff herein written notice of this Petition for Removal and of its Bond for Removal herein prior to the filing of same.

VI.

Your Petitioner herein presents a good and sufficient bond for its entering in the District Court of the United States for the Western District of Washington, Northern Division within thirty days from the filing of this petition, a certified copy of the record in this suit and for paying the costs that may be awarded by said District Court, if said Court shall hold that this cause was wrongfully or improperly removed thereto.

Wherefore, your Petitioner Prays that this Court proceed no further herein except to make the Order of Removal required by law to accept such bond and security and to cause the record herein to be removed to the District Court of the United States

for the Western District of Washington, Northern
Division.

CATLETT, HARTMAN, JARVIS
& WILLIAMS,

Attorneys for Petitioner. [11]

(Duly verified.)

[Endorsed]: Filed May 24, 1944. [12]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 945

JENNIE M. BABBITT,

Plaintiff,

vs.

RAILWAY MAIL ASSOCIATION,

Defendant.

ANSWER

Answering plaintiff's complaint, the defendant
alleges:

I.

Answering paragraph I, admits the allegations
therein contained.

II.

Answering paragraph II, admits it is a non-profit
Fraternal Beneficial Association of Railway Postal
Clerks of the United States Railway Mail Service.

That its Charter was issued by the State of New Hampshire, and that it is maintaining an office or branch in Seattle, Washington.

III.

Answering paragraph III, admits the allegations therein contained, and that the Certificate mentioned therein contains among others, the provisions therein set out.

IV.

Answering paragraph IV, admits that Fred I. Babbitt became affected with multiple sclerosis some years prior to July 31, 1928, the date and time of said affliction being unknown to the defendant. Admits that the said Fred I. Babbitt was so afflicted on July 31, 1928, and that on or about said date by reason of such affliction he was retired as a railway postal clerk. [20] Admits he continued to be afflicted with multiple sclerosis continuously until the date and time of his death, July 30, 1943, and by reason thereof was wholly and continuously disabled from following the occupation of railway postal clerk. Denies each and every other allegation contained in the said paragraph IV.

V.

Answering paragraph V, admits that Fred I. Babbitt made the payments therein alleged. Denies each and every other allegation therein contained.

VI.

Answering paragraph VI, denies the defendant modified or that there was any modification of the

agreement between Fred I. Babbitt, and this defendant contained in the terms of the Beneficiary Department Certificate described and alleged in paragraph III of plaintiff's complaint, and the charter, constitution and bylaws of the defendant, which are a part thereof and copies of which are in the possession of the plaintiff, denies that the said agreement was modified or changed or any of the provisions thereof waived as alleged in said paragraph VI for the reason set out therein or for any reason whatsoever.

VII.

Answering paragraph VII, admits that Fred I. Babbitt died on July 30, 1943. The defendant has not sufficient knowledge nor information to form a belief as to whether he slipped on a rug as therein alleged and, therefore, denies that allegation. Denies that the fracture of his left hip caused fat embolus to go into his lung or brain. Denies that the cause of his death was due to the fracture alleged in said paragraph. Denies that his death resulted from said injuries alleged in said paragraph or thru any external, violent and accidental means. [21]

VIII.

Answering paragraph eight, admits the allegation therein contained.

IX.

Answering paragraph nine, denies that the sum of \$4,000 or any sum whatsoever or any interest is due and owing from the defendant to the plaintiff.

Further answering plaintiff's complaint and for a First Affirmative Defense, the defendant alleges:

I.

The Charter, Constitution and Bylaws of the defendant which were, at all times alleged in plaintiff's complaint, a part of the contract or agreement between the deceased Fred I. Babbitt and the defendant, and subsequently to his death, with any person claiming an interest in said certificate, or any rights thereunder, contained at all said times and now contain the following, among other provisions:

Article XVI, Sec. 17. "No action, suit, or proceedings at law or in equity shall be brought for recovery under the certificate of membership, in the Beneficiary Department within three months from the date of the filing of complete proofs at the Association's office, nor brought or maintained at all, unless begun within three months after mailing of notice of rejection of the claim by the Association or within two years from the day of death or the termination of temporary disability, or the commencement of permanent total disability within the terms of the certificate nor unless claimant has exhausted all of his or her rights under Section 12 of this Article. Claims not noticed, proved, or prosecuted as above provided will be forfeited to the Association."

This action was not brought nor commenced within the time provided in said Article, and Sec-

tion of the Charter, Constitution and Bylaws of the defendant.

As a Second Affirmative Defense, the defendant alleges: [22]

I.

The said Charter, Constitution and Bylaws of the defendant at all times during the existence of the Beneficiary Department Certificate described and alleged in paragraph III of plaintiff's complaint and which Charter, Constitution and Bylaws were at all times a part of the said Certificate provided, at all times mentioned in plaintiff's complaint and do now, among other things, the following:

Article XVI, Sec. 8 (d). "Accidental death and accidental injuries are defined to be either sudden, violent death, or accidental injuries, from violent and accidental means alone, resulting directly, independently and exclusively of all other causes, and not the result of the member's own vicious, intemperate, or unlawful conduct, and producing visible marks or other evidence of injury or violence on or within the body of the member. There shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect or bodily infirmity is a contributing cause of death or injury, * * * *."

II.

The said Certificate mentioned and alleged in paragraph III of plaintiff's complaint, at all times

since its issuance contained and now contains among other provisions the following:

“Provided, however, no benefit or sum whatsoever shall be payable in any case whatsoever unless the accident alone results in producing visible external marks of injury or violence suffered by the body of the member, nor unless the death or disability results wholly from the injury, and within one year from the date thereof. * * * *”

“Accidental death shall be construed to be either sudden, violent death from external violent and accidental means resulting directly, independently and exclusively of any other causes, and not the direct or indirect result of the member’s own vicious or unlawful conduct; or death within one year, as the sole result of accidental means alone. There shall be no liability whatever when disease, defect, or bodily infirmity is a contributing cause of death. * * * *”

III.

The death of the said Fred I. Babbitt did not result wholly or at all from the injury alleged in plaintiff’s complaint. The death of the said Fred I. Babbitt did not result from external violent and accidental means resulting directly, independently and exclusively of any other causes. The death of the said Fred I. Babbitt was not the sole result of accidental means alone. Disease, defects or bodily infirmity was the cause [23] of or a contributing cause of the said death.

Wherefore, having fully answered plaintiff’s com-

plaint, the defendant prays that it be dismissed and that it recover its costs and disbursements herein.

CATLETT, HARTMAN, JARVIS
& WILLIAMS,

Attorneys for Defendant.

Copy received July 10, 1944. Lundin & Barto.

[Endorsed]: Filed July 11, 1944. [24]

[Title of District Court and Cause.]

REPLY

Replying to the defendant's Answer, the plaintiff alleges:

1.

Replying to Paragraph 1 of the First Affirmative Defense, the plaintiff admits that Article 16, Section 17, of the Constitution of the defendant, contained the provision therein set forth, and the plaintiff denies each and every other allegation in said Paragraph contained.

2.

Replying to Paragraph 1 of the Second Affirmative Defense in the Answer contained, the plaintiff admits that Article 16, Section 8 (d) contains the provision therein set forth, and the plaintiff denies each and every other allegation in said Paragraph contained.

3.

Replying to Paragraph 3 of the Second Affirmative Defense this plaintiff denies each and every allegation thereof.

And in reply to the allegations contained in said Answer the plaintiff alleges: [25]

1.

At all times since July 31st, 1928, the defendant, its officers and agents, well knew that Fred I. Babbitt was totally disabled, and by the acceptance of the bi-monthly payments made by Fred I. Babbitt to the defendant the defendant waived the provisions to an accidental death, as set forth in Paragraph 1 and 2 of the Second Affirmative Defense of the Defendant's Answer, and by such acceptance of the bi-monthly payments the contract became modified by mutual consent, and the defendant became obligated to pay upon its beneficiary certificate, even though Fred I. Babbitt was unable to perform the duties of a railway postal clerk, and even though the deceased's defect or bodily infirmity he had on July 31st, 1928, might have been a contributing cause of his death.

Wherefore plaintiff prays judgment in accordance with the prayer of her complaint.

/s/ LUNDIN & BARTO,
/s/ ALFRED H. LUNDIN,

Attorneys for Plaintiff.

Copy received 10/4/44. Catlett, Hartman, Jarvis & Williams, for Defendant.

[Endorsed]: Filed Oct. 4, 1944. [26]

[Title of District Court and Cause.]

MOTION TO STRIKE DEMAND FOR JURY

Defendant respectfully moves this Court for an order striking Plaintiff's demand for jury on the grounds and for the reasons that:

The said demand for jury trial was not served nor filed herein within the time prescribed by the practice and applicable rules of procedure relating thereto.

That all issues in the above entitled action were made up and determined ten days before the service or filing herein of said demand for jury trial.

That the issues in the above entitled cause are not tryable by jury.

That the above entitled cause has heretofore been placed on this Court's non-jury trial calendar and continued as such non-jury case thereon.

**CATLETT, HARTMAN, JARVIS
& WILLIAMS,**

Attorneys for Defendant.

Copy received. Lundin & Barto, Attys. for Plf.

[Endorsed]: Filed Oct. 11, 1944. [30]

[Title of District Court and Cause.]

ORDER ON DEFENDANT'S MOTION TO
STRIKE DEMAND FOR JURY AND
PLAINTIFF'S MOTION FOR JURY
TRIAL

After argument by counsel for plaintiff and defendant on the motion to strike plaintiff's demand for jury and the plaintiff's motion for order directing trial by jury.

It is hereby Ordered that at the time of the trial of the above entitled cause a jury be impaneled to hear such issues of fact as may arise in the trial of this cause and as the Court at the trial hereof may direct be decided by the said jury and to act in an advisory capacity herein in connection with such issues of fact as the Court may refer to the said jury for that purpose to which the defendant excepts and its exception is allowed.

Dated this 17th day of October, 1944.

LLOYD L. BLACK,

United States District Judge.

Presented by:

D. H. JARVIS.

O.K. as to form.

ALFRED H. LUNDIN.

[Endorsed]: Filed Oct. 17, 1944.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above-Mentioned Cause,
Find for the Plaintiff in the amount of Four Thou-
sand (\$4000.00) Dollars.

Dated this 9th day of August, 1945.

LLOYD X. CODER,
Foreman.

[Endorsed]: Filed Aug. 9, 1945. [33]

[Title of Court and Cause.]

ALTERNATIVE MOTION FOR JUDGMENT
OR NEW TRIAL

Defendant moves the Court to set aside the verdict entered in the above entitled cause on August 9, 1945, and to enter judgment in accordance with its motion for directed verdict on the ground that the motion for directed verdict should have been granted because among other grounds and reasons:

(1) The record in this case shows that plaintiff's demand for jury trial was stricken herein and it was ordered that this case be tried by a jury acting only in an advisory capacity, and there was no issues of fact sufficient to submit to the said jury;

(2) That there was not sufficient evidence to justify the submission of this cause to the jury at the

conclusion of the plaintiff's testimony or at the conclusion of all of the testimony, and by reason thereof this case should have been dismissed by the Court, or the jury should have been directed to bring in a verdict for the defendant;

(3) There was prejudicial admission of evidence in the trial of this case and prejudicial admission of medical testimony and conclusions to which proper objections were made, and if said objections had been sustained there was not sufficient evidence to submit to the jury, or if submitted [35] the jury should have been instructed by the Court to bring in a verdict for the defendant;

(4) Because of errors and matters hereinafter recited in defendant's motion for new trial.

The above entitled motion is made without waiving the defendant's position at the time of the trial; that this matter should have been decided as a matter of law upon the pleadings and plaintiff's case dismissed thereon; that the Court improperly directed the amendment of plaintiff's complaint; that the Court improperly submitted any issue of fact to the jury; that the jury was impaneled and any issue of fact was submitted to it in other than an advisory capacity, and that there were any issues of fact which could properly be submitted to the jury at all.

In the alternative, defendant moves the Court to set aside the verdict and grant defendant a new trial on the following grounds among others:

(1) The irregularity in the proceedings of the Court, jury or adverse party; orders of Court and

abuse of discretion by which the defendant was prevented from having a fair trial;

(2) Misconduct of prevailing party and jury;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) That there was no evidence or reasonable inference from the evidence to justify the verdict or the decision and that it is contrary to law;

(5) Error in law occurring at the trial and excepted to at the time by the defendant;

(6) The Court directing and permitting the amendment of plaintiff's complaint at the time of trial;

(7) The Court submitting any issue of fact herein to [36] a jury;

(8) The Court submitting any issue of fact herein to a jury in other than an advisory capacity;

(9) The Court permitting the introduction of plaintiff's Exhibit 5, (a picture of Fred I. Babbitt taken in 1932);

(10) The Court permitting the introduction of plaintiff's Exhibit 4, because not sufficient or properly identified, or at all;

(11) The Court overruling defendant's objections of defendant to testimony of Jennie M. Babbitt in regard to the physical condition of Fred I. Babbitt,

and the apparent effects of disease ascertainable only by expert testimony;

(12) The Court overruling defendant's objections to the statements of Dr. Don Palmer relative to the claimed cause of death of Fred I. Babbitt;

(13) Overruling of objections to the opinions and conclusions of Dr. Jacobson as to the claimed cause of death of Fred I. Babbitt;

(14) The failure to permit defendant's Exhibits 5 and 6 for identification, being copies of plaintiff's original complaint and reply on file herein to be introduced in evidence;

(15) The failure of the Court to dismiss this action at the conclusions of plaintiff's testimony;

(16) The failure of the Court to direct the jury to bring in a verdict for the defendant at the conclusion of plaintiff's testimony;

(17) The failure of the Court to give the instructions requested by the defendant;

(18) The giving of the instructions to the jury excepted to by the defendant. [37]

Defendant makes the foregoing motion without in any way waiving its position taken at the trial of the above entitled cause and heretofore stated herein in this motion for judgment.

CATLETT, HARTMAN, JARVIS
& WILLIAMS,

Attorneys for Defendant.

Copy received Aug. 17, 1945.

ANTHONY SAVAGE,
By ALICE PRITCHETT.

Copy received Aug. 18, 1945.

LUNDIN & BARTO,
By ALFRED H. LUNDIN.

[Endorsed]: Filed Aug. 18, 1945. [38]

[Title of District Court and Cause.]

ORDER DENYING ALTERNATIVE MOTION
FOR JUDGMENT OR NEW TRIAL

Be It Remembered that the defendant's alternative motion for judgment or new trial was by stipulation submitted to the court upon briefs; that the defendant served and filed its opening brief, and thereafter the plaintiff served and filed her answering brief, to which the defendant served its reply brief; and that thereafter the court having considered the matter in the light of the briefs filed by both parties, it is hereby

Considered, Ordered and Adjudged that the defendant's motion must be and hereby is denied. Exceptions allowed to defendant.

Done in Open Court this 4th day of January, 1946.

CHARLES H. LEVY,

District Judge for the Western District of Washington, Northern Division.

Presented by:

LUNDIN & BARTON,
ANTHONY SAVAGE,
Attorneys for Plaintiff.

(Acknowledgment of Service attached.)

[Endorsed]: Filed January 4, 1946.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 945

JENNIE M. BABBITT,

Plaintiff,

vs.

RAILWAY MAIL ASSOCIATION,

Defendant.

JUDGMENT

This action came on regularly for trial on the 8th day of August, 1945. The plaintiff appeared by her attorneys, Lundin & Barto and Anthony Savage. The defendant appeared by its attorneys, Catlett, Hartman, Jarvis & Williams. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider their verdict and subsequently returned into court, and being called, answered to their names and said:

We, the jury in the above entitled cause, find for the plaintiff in the amount of \$4000.00. Dated this 9th day of August, 1945. Lloyd S. Coder, Foreman.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is Considered, Ordered and Adjudged that Jennie M. Babbitt, plaintiff,

have and recover from Railway Mail Association, defendant:

1. The amount of \$4000.00.
2. Interest on \$4000.00 at the rate of 6% per annum from the 3rd day of October, 1943. [42]
3. Her costs and disbursements incurred in this action amounting to \$46.90.

Exceptions allowed to the defendants.

Dated this 4th day of Jan. 1946.

/s/ CHARLES H. LEAVY,
District Judge for the Western District of Wash-
ington, Northern Division.

Presented by: Anthony Savage & Lundin & Barto,
of Attorneys for Plaintiff.

Copy Rec'd. 11/28/45. Catlett, Hartman, Jarvis
& Williams, Attys. for Defendant.

[Endorsed]: Filed Jan. 4, 1946. [43]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Jennie M. Babbitt, and to her attorneys, Messrs.
Lundin & Barto, and Anthony Savage:

Notice is hereby given that Railway Mail Association, defendant above named, hereby appeals to the United States Circuit Court of Appeals, for the Ninth Circuit, from the final judgment entered in

the above entitled action upon the 4th day of January, 1946.

CATLETT, HARTMAN, JARVIS & WILLIAMS, & JAMES G. MULROY.

By JAMES G. MULROY,
Attorneys for Defendant.

[Endorsed]: Filed March 25, 1946. [44]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered 1 to 51, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designation of Record filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle and that the same together with the Reporter's Transcript of Proceedings, the original of which is sent up as part of this record, constitute the record on appeal from the Judgment of said United States District Court for the West-

ern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit, dated January 4, 1946.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit: [49] Clerk's fees (Title 28, U.S.C. Supp. IV, Sec. 555) for making record:

4 Pages at 10c (Copies furnished)	\$.40
47 Pages at 40c	18.80
Notice of Appeal	5.00
	<hr/>
Total.....	\$24.20

I further certify that the foregoing amount ofhas been paid to me by the Attorneys for Appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle in said District, this 25th day of April, 1946.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy [50]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 945

JENNIE M. BABBITT,

Plaintiff,

vs.

RAILWAY MAIL ASSOCIATION,

Defendant.

TRANSCRIPT OF PROCEEDINGS

The Court: Now there are certain preliminary matters that perhaps will have to be disposed of before we proceed in the selection of a jury, and the first is whether or not there be a jury in this case.

I have read the pleadings and likewise the order that Judge Black made in the case at the time certain motions in reference to a jury were up and were disposed of, and whether Judge Black held that this, in his opinion, was an equity action and therefore no jury was required, or whether he denied—rather, I should say, struck the affirmative matter that was filed here some time in October of 1944 at the same time the jury demand was made, and in striking that concluded that a demand for a jury was not timely made. I do say that if the jury is to be called as his order would indicate, solely in an advisory capacity, the disposition of this Court would be not to call a jury.

Mr. Lundeen: If the Court please, the way the matter arose was due to my unfamiliarity with the

rules of court. I filed a reply, and immediately upon filing the reply made a demand for a jury under the rules of the court. The reply was stricken because no reply is necessary under the rules, or proper, and because this demand was late, counsel prevailed in having the demand stricken. [4*]

The rules of court provide for the granting of a jury, and then under the rules, I made an application for a jury, because it was——

The Court: I am quite familiar with the rules.

Mr. Lundeen: Yes, but I was just explaining my position, if the Court please, and the Court did grant my demand for a jury, and those are the facts and the reason for it.

The Court: But the granting was rather limited in itself.

Mr. Lundeen: He did state that he would—it would be advisory, and the order so provides. I do not know what Judge Black had in mind by stating that it would be advisory, because I regard this as a law case and not an equity case. It is under contract and that is his order, and we do desire the jury, and the reason the demand was first made, was because of my unfamiliarity with the rules, and Judge Black later having granted us the right to a jury, although he did qualify it as the order provides. We would like very much to have a jury trial in this sort of a cause.

The Court: I am rather under the impression, and of course the order of Judge Black would seem to lend weight to that impression, that this is an

* Page numbering appearing at foot of page of original Reporter's Transcript.

equity action, at least as to the initial issue in it. [5]

Mr. Lundeen: Well, I think it will develop into a law action. There are some allegations in our complaint that would give Your Honor that impression, but we now regard it as simply a law action.

The Court: Well, as I read your complaint, Mr. Lundeen, and the answer to it, and the issues that are thus framed, the initial issue that must be disposed of, before we can proceed at all to the second one is whether this contract of insurance was modified by reason of certain actions that took place as between the insured and the insurer, and whether the insurer would be estopped from denying such modification.

Mr. Lundeen: If that is the Court's attitude, we would prefer to waive those allegations and proceed as a law action.

The Court: Well, if you adopt the view that you are not going to make any proof of the issue of modification of the contract—

Mr. Lundeen: I think that is the position we will have to take.

The Court: Then you would immediately place yourself in a position where you would be subject to a motion for a summary judgment—that is, if you are relying upon the contract entirely, if I read your pleadings correctly. [6]

Mr. Lundeen: Well, we are relying on the contract, and that the injury was due to the accident. I don't see how we are entitled to summary judgment.

The Court: But you allege that the contract itself, provided among other things that he must—at least I gather this—now if I am wrong you correct me in it, that he must be in a physical condition to carry on his work as a railway mail clerk, before liability arises under the contract of insurance.

Mr. Lundeen: As I recall that, that was simply a provision relative to an accident that did not cause death. I think that under the terms of the policy he does not have——

The Court: I think, Mr. Lundeen, I will hear from the defendant and get their version of it.

Mr. Jarvis: May it please the Court, this action was started by the plaintiff against the defendant association to recover on an accident policy. I term it an accident policy, which may be a legal conclusion, but the fact is that the policy itself and that part that is set out in the plaintiff's complaint, only gives a benefit under the policy in the event of either accidental injuries or accidental death.

The plaintiff alleges in Paragraph III of her complaint that the policy was issued by the defendant [7] to the plaintiff, and that the policy in substance is summarized by the plaintiff in her pleadings, if the member—that was Mr. Fred I. Babbitt, who was named in the certificate as the insured, should receive bodily injuries during the continuance of the certificate through external, violent and accidental means not the results of his own vicious, or intemperate conduct, which shall wholly and continuously disable him from following the occupation of a Railway Postal Clerk, he would be

entitled to receive from said Benefit Fund in the following manner:

“If death shall result from such injuries alone within one year from the date of the injury, the Association will pay \$4,000.00.”

“Further provided that accidental death shall be construed to be either sudden or violent death from external, violent and accidental means, resulting directly, independently and exclusively of any other causes, and not the direct or indirect result of the member’s own vicious or unlawful conduct; or death within one year, as the sole result of accidental means alone, and there shall be no liability whatever when disease, defect or bodily infirmity is a contributing cause of death.”

The limitation on the benefits that might be received, are contained not only in the granting part of the policy, but are contained in the provision that there [8] should be no liability whatever when disease, defect or bodily infirmity is a contributing cause of death.

The next paragraph alleges that Mr. Babbitt became afflicted with multiple sclerosis, in 1928, and being unable to perform his duties as a Railway Postal clerk, he was retired for such total disability on July 31, 1928, and until his death was wholly and continuously disabled from following the occupation of a Railway Mail clerk, and the multiple sclerosis with which he was afflicted, was known—that is, the officers of the defendant Railway Mail Association knew that he was afflicted with multiple sclerosis on July 31, 1928, and at all times since then.

The action is not brought to recover any benefit because of total disability, because the total disability was caused by disease alone, which not only was the sole cause but was the contributing cause of Mr. Babbitt's death.

Now this is a peculiar kind of a policy. As I say, it is a beneficial accident policy. Then it is alleged in the complaint that Mr. Babbitt paid the premiums that were called for in the policy, which I believe came to \$1.50 a month during the time he was incapacitated, and that the officers received and accepted the premiums knowing that Mr. Babbitt was physically unable to perform [9] his duties as a Railway Postal clerk.

Then it is alleged that by accepting the payments mentioned from Mr. Babbitt, the defendant modified the agreement between the parties and waived the provisions that the bodily injuries received shall wholly and continuously disable him from following the occupation of a Railway Postal clerk. Now that is one allegation of one modification of the terms of the contract between the defendant association and the plaintiff.

And then it is alleged that we—that is, the defendant Railway Mail Association, modified the agreement and waived the provision that accidental death as therein defined shall be independently and exclusively of any other causes, and that there shall be no liability whatsoever when disease or defect or bodily infirmity is a contributing cause of death, because we well knew at all times since July 31, 1928; that we had accepted premiums on these

monthly assessments on the policy—we waived that provision that death could not—that we waived the limiting provision that disease, defect or bodily infirmity could not be the cause of death.

Now the plaintiff proceeds in the complaint—first, they allege that the decedent, Mr. Babbitt, was suffering from multiple sclerosis and was wholly incapacitated from performing his occupation as a Railway Mail [10] clerk. Then they alleged in the next paragraph that by reason of that fact, and by reason of the fact that we knew of it, we waived the provision in the policy giving a benefit in the event of Mr. Babbitt's death, in that we waived the provision that there should be no liability if defect, or bodily infirmity or disease should be a contributing cause of death.

Then it is alleged that Mr. Babbitt fell down on July 9, 1943; that he suffered a fractured hip with a resulting embolus to the brain and to the lungs and that he died from it. Now the only possible, or the only theory or necessity for pleading the injury. I mean, the disease that Mr. Babbitt was afflicted with since 1928 up until the day of his death, was on the theory that we had waived one or more of the terms of the policy as it is substantially alleged—as it is actually alleged in the complaint. In other words, that we had waived the provision that disease, defect or bodily infirmity could not be a contributing cause of death. Now the only reason that we could waive that would be that he at the time of his death, was suffering from a disease or bodily infirmity which either was the cause

of death or was a contributing cause of his death. That is the only theory on which—that is the theory on which the complaint was drawn and was filed, and the [11] theory on which we have been put on trial, and our answer in this case—that is, that there could be no waiver as a legal matter, Your Honor, unless it is admitted in the complaint as a judicial admission that Mr. Babbitt was suffering from disease, defect, or bodily infirmity. That has to be admitted, either actually in the complaint—which it is, or impliedly, which it likewise is or there would be no purpose or theory in bringing—in alleging the mortal disease with which he was afflicted, and alleging that we had waived the provision of the complaint. In other words, that although he fell and died, the disease, defect or bodily infirmity, it is admitted, was a contributing cause of the death, and the only issue before Your Honor at this time is whether or not as a matter of law, or if facts, are introduced, whether or not as a matter of fact, and a concluding matter of law, we waived the expressed and written terms of the contract between the defendant association and Mr. Babbitt.

The Court: Very frankly, the Court is in doubt on this issue of a jury trial. If I take it from your argument that you admit that there are such issues here as to make of this a law action, rather than an equity action——

Mr. Jarvis: Your Honor, that of course is a question of law, I think. The contract is not in the [12] file, Your Honor.

The Court: No, it is not.

Mr. Jarvis: It could be decided on the pleadings as it is. That is, whether or not in accordance with the allegations of the complaint and that part of the contract that is set up in the complaint, there is—and solely, a question of law as distinguished from an issue of fact that should be decided by the jury. If the complaint is in the file, the whole issue of law could be decided by Your Honor without the aid of a jury.

If there is evidence, I don't know whether merely the putting of the contract, and then such modifications of it as the plaintiff may deem essential to a question of fact, would create an issue of fact or not. I do think under the pleadings as they now stand the defendant may be entitled, and I claim that the defendant is entitled, to a summary judgment, but if there is the issue that might be raised by putting before Your Honor the contract, and then the question of law to be drawn from the contract, and the pleadings. I don't know whether the mere placing of the contract in evidence would constitute such an issue that Your Honor should call the jury to act in an advisory capacity on that question, or not. In any event, the question of the jury acting in an advisory capacity, is, under the rules and under the [13] order of Judge Black is a matter that is discretionary with Your Honor, and is not mandatory one way or the other on any special issue that Your Honor might want to refer to the jury, so Your Honor could or could not, as Your Honor chose, refer that issue to the jury. It is our opinion that is the only issue before the Court.

Mr. Savage: May I address Your Honor?

The Court: Yes.

Mr. Savage: In view of the statements made by Your Honor, and counsel for the defendant, the plaintiff will now move to amend his complaint by striking therefrom any and all allegations to the effect that the contract was modified, and that the defendant did, by accepting payments of premiums and assessments which were due under the certificate of insurance—did waive this provision in the contract or is estopped, is set up as a defense that any bodily infirmity or disease, contributed to death. We will proceed on the contract, and the contract itself calls for or states that if the plaintiff is able to establish that death occurred solely by violent, accidental means, without any disease or bodily infirmity contributing to that death, then the beneficiary is entitled to recover under that policy.

The Court: Then submit to the jury the single issue, so far as the jury is concerned, as to whether or [14] not death resulted from the accident?

Mr. Savage: Yes, it comes within the terms of the policy and the constitution and by-laws of the defendant organization, because I understand the certificate and their constitution and by-laws are all a part of the contract of insurance, here, and then submit to the jury the sole question whether this was an accidental death within the terms of that policy of insurance.

The Court: And leave for the determination of the Court in the first instance the question as to whether there was a waiver of the various cove-

nants in the contract itself, by reason of the subsequent conduct—that is, subsequent to 1928, of the insurer in accepting the premiums?

Mr. Savage: May I confer with Mr. Lundeen before I answer that question, please?

Well, we are content to stand on the policy itself, so that the Court will not be under any necessity of deciding whether there was a waiver. We will waive it ourselves. We will strike it from the complaint, and amend the complaint in that respect.

The Court: I of course have examined these pleadings. I have gone over them a number of times, but I am not as familiar with the issues as counsel are who represent the respective parties here, but it would appear to me that before any recovery could be had or even any consideration of a recovery be taken, it is necessary to establish a modification of this contract, either express or implied, because the pleaded facts of themselves, if you take them, eliminating anything in the nature of a waiver, places the plaintiff in a position where a recovery could not be had.

Mr. Savage: Frankly, I don't understand why. Your Honor says that. The Court would have to assume that as a matter of fact the multiple sclerosis did contribute to the death.

The Court: No, I am eliminating that feature of the case entirely.

Mr. Savage: Now he is entitled to retain his membership in this organization, even though he does suffer from such a disability that he is retired from active service.

The Court: Well, there is no allegation to that effect. [16]

Mr. Savage: There is an allegation to the effect that he was a member in good standing at the time and that is admitted by the defendant. It would seem to me that would cover it, Your Honor.

The Court: Well, that is the phase of the case that is giving the Court some concern, from a hasty examination of these pleadings, I was rather led to the conclusion that when he became totally disabled from carrying on his work as a Railway Mail clerk he then and thereafter, unless there was a waiver of the provisions of the contract of insurance, was not entitled to any benefits under the contract.

Mr. Savage: I do not believe there is any such contention on the part of the defendant. I will ask him in open Court if there is.

Mr. Jarvis: What is that, Your Honor? Your Honor that is answered this way: The policy had two provisions, one gave a benefit in the event that the insured was injured through accidental means alone—a weekly benefit. The other provision gave a benefit in the event that if such injuries through accidental means alone should cause death, resulting directly, independently and exclusively of any other causes, and that disease, defect and bodily infirmity should not be the cause, but a contributing cause of the death. [17]

Plaintiff then alleges that the defendant became afflicted with multiple sclerosis and was permanently retired on July 31, 1928, as a Railway Mail clerk.

The Court: Now, did that permanent retirement, if the information had of been passed on to the insurer, the defendant, sever the plaintiff automatically under the terms of the contract?

Mr. Jarvis: No, sir, it did not.

The Court: In connection with his policy, and relieve the defendant of liability?

Mr. Jarvis: Not a permanent wholly retirement, as I understand the wording of the policy, but the plaintiff alleges in the complaint that this permanent disability and retirement and the affliction of multiple sclerosis remained permanently and continuously until the insured died on July 30, 1943; that in order to keep the policy in force he paid \$1.50 every two months and in addition thereto paid certain special assessments which we accepted, knowing that Mr. Babbitt was physically unable to perform the duties of a railway postal clerk.

Then it is alleged in Paragraph VI of the complaint that by reason of accepting those payments, we waived two parts of the policy. We waived first the part that the injury could not have resulted from accidental means alone and that disease, defect or bodily [18] infirmity could not have contributed to it—that is, the injury. Then second, it is claimed that we waived that provisions of the policy that death should be defined as caused independently and exclusively of any other causes—that is, any other causes other than accidental—external and accidental means, and that disease, defect, or bodily infirmity could not in any way be a contributing cause of death. Now it is claimed that we waived

those two provisions of the policy, and it is alleged in Paragraph IV of the complaint that the decedent—that is in the plaintiff's own complaint, it is alleged that the decedent was suffering from multiple sclerosis. Then it says in Paragraph V of the complaint that although we knew he was suffering from multiple sclerosis, we received and accepted premiums, and by reason of our acceptance of those premiums and of our knowledge that the defendant was physically unable to perform the duties of a railway postal clerk, we waived the terms of the policy and that disease, or bodily infirmity could not be the cause, but a contributing cause of the death.

Now the only theory or possibility, Your Honor, of the complaint, and of which we have been put on trial in this case, and the theory on which we have assumed that the plaintiff is proceeding, and which we could assume up until the statements made in court this morning, [19] at the time of the trial of this case, is that the plaintiff claims and admits, as a judicial admission, and as Your Honor will see by the reply in the file, which is stricken, it is true, but it is nevertheless an admission of fact and admissible as such. Your Honor will see that it is admitted, and the theory of the complaint could only be based on the fact that it is admitted that disease, defect or bodily infirmity was either a contributing cause of, one, the injury; or two, the death. If it was a contributing cause of either one, the plaintiff is not entitled to recover, unless Your Honor should decide as a matter of law that we

have waived the terms of the policy, so we have proceeded on the theory that the only issue before Your Honor, in view of the judicial waiver and the allegations of the complaint to which we have been put to trial—we have proceeded that the only issue before Your Honor is the question, if as a matter of fact, or if as a matter of law, we waived the policy. On that question Your Honor has a discretion, either if it is a question of fact to have it decided by the jury—if it is a question of fact Your Honor has the discretion to decide it yourself, and of course Your Honor has the duty to decide it as a matter of law, irrespective of any other aid or part of this court. So, it is our position, and we have been [20] put to trial in this case—it is our position that we have not waived the terms of the policy, but by reason of raising that issue in this Court, and proceeding up to the trial of this case, the defendant could only proceed on that theory, on the ground that the disease, defect or bodily infirmity was a contributing cause of Mr. Babbitt's death.

The Court: Well, but suppose the plaintiff, now, by his proffered amendment to his pleading, offers the single issue as to whether or not death occurred by reason of external accidental means, without any contributing physical ailment?

Mr. Jarvis: Well, Your Honor, he has already made a judicial admission in this very case and has put us to an answer and a trial, up to the time of the trial of this case, that the decedent came to his death; that disease, defect, or bodily infirmity was

a contributing cause of the death. Can he then go back and try that issue?

The Court: I don't quite read the pleadings in that manner. Of course I have given no consideration to this reply because it was stricken.

Mr. Jarvis: It was stricken, Your Honor, but as an evidentiary matter, it is admissible as any other judicial admission. [21]

The Court: Well, I don't even read it quite that way, Mr. Jarvis, that they admit that he came to his death by reason of his physical condition contributing to the injuries from the accident, but it is rather in the alternative. The language is stated in the alternative, that even if he did come to his death by reason of those facts, there still would be liability, and there was a modification of the contract.

I am inclined to feel that though I am perfectly willing to hear from both sides on this, that if there is a waiver as to certain limitations fixed by the terms of this contract of insurance, and the action is sought to be maintained solely upon the issue as to whether or not the deceased met with an accident, and as to whether or not, as a result of that accident, within the time limited by the policy, he died, and then the further issue, if he died as a result of that accident, and a contributing cause of his death was his then physical condition, he would not be entitled to a recovery.

Mr. Savage: We offer to proceed upon the grounds just as outlined by Your Honor.

Mr. Jarvis: Your Honor, may I take in that

connection, this exception to Your Honor's ruling, in that complaint was filed—Paragraph IV of it, alleges—Paragraph IV, of it alleges that Mr. Babbitt [22] was suffering from multiple sclerosis continuously since July 31, 1928; that he paid the dues or premiums that became due; that we accepted them knowing that he was physically unable to perform the duties of a Railway Postal Clerk; that by accepting these payments—and it is then alleged by then accepting these payments we waived the insurance agreement between Mr. Babbitt and the defendant association; that bodily injuries received had wholly and continuously disabled him from performing the occupation of a Railway Postal Clerk, and that we further waived the provision that there shall be no liability whatsoever when disease, or defect, or bodily infirmity is a contributing cause of death, because that theory of plaintiff's complaint and those allegations, can only be based on the theory that Mr. Babbitt was suffering from a disease, defect or bodily infirmity at the time of his death, which was a contributing cause of his death, and that the complaint has been filed and the answer has been filed and the case has proceeded to trial up to the present time on that theory, on which we are entitled, I believe, to summary judgment, and that by removing that issue from the plaintiff's complaint. Your Honor changes the theory of the Plaintiff's complaint entirely from one of a modification of a contract, with a waiver, to one that is purely brought—that is [23] brought and which is radically different, and in which the

plaintiff is attempting to come within the terms of the policy. In other words, having made a solemn and a judicial admission in this court—I don't say actually, but I say on the theory of the plaintiff's complaint having made a solemn and judicial admission in this court that disease, defect or bodily infirmity was a contributing cause of death, then the plaintiff can not change it, either the complaint or the trial, or the theory of her case, or the proceedings in this court to an entirely distinct one in which it is claimed that the death was caused by—that the death came within the beneficial terms of the policy. They are so inconsistent that I do not think at this time, at this stage of this case that the plaintiff can make the radical change.

The Court: I am unable to quite follow your argument there, because the plaintiff is now taking the position—and it may be that you could show that you are surprised by the position that he is suing on the contract of insurance for a death resulting from an accidental or from accidental causes, and he assumes the burden of showing that that death did result from accidental causes independent of a contributing cause as set forth in the policy.

Mr. Jarvis: My theory, Your Honor, is that they [24] have admitted that there was a contributing cause.

The Court: Well I can not find anything in the pleadings that could be——

Mr. Lundeen: Your Honor, we never admitted that in any manner whatsoever.

The Court: Even in the reply there is a statement, but it is in the alternative. It is not an admission.

Mr. Jarvis: They claim we waived the limiting clause that disease, defect, or bodily infirmity was not a contributing cause of death. We could only waive that if disease, defect, or bodily infirmity was a cause of death. Otherwise, that is outside of the complaint, and the issues that are raised. In its simplest analysis, it is that they plead that part of the contract. They plead multiple sclerosis. They do not——

The Court: But assume that they desire to make proof as to their loss under the limitations as fixed by the contract of insurance itself, and the issue of waiver does not come into the case at all, but they assume that their recovery, if they are entitled to one, is based solely upon the fact that there was an accident, followed by death; that of course, that it was independent of any contributory negligence, then the question might present itself whether the burden shifts in that regard. [25]

Mr. Jarvis: Well of course, Your Honor, we claim that the theory of the complaint is based on the waiver, and we claim that the only issue before Your Honor is whether or not there was a waiver, and that under the pleadings as they stood at the beginning of this trial, the only evidence the plaintiff could put in would be on the question of waiver.

The Court: You mean if an amendment is allowed now, striking from this complaint all allegations in reference to a waiver of the covenants of

this contract of insurance and a modification of it, and the action is sought to be maintained upon the contract liability, that then you would be so surprised that you would not be prepared to meet that issue?

Mr. Jarvis: Oh, Your Honor, I would not say I would be so surprised, no, that I would not be prepared to meet that issue, but I say that the plaintiff should not—is not entitled to introduce any evidence under the theory—under the allegations of her complaint other than the fact that there was a waiver, and I would like to know if there is. I object and except, Your Honor, to any amendment to the complaint at this time, on the grounds and for the reasons that I have stated.

I would like to know what the new complaint is if they want to draw a new contract for us, and now if [26] they want a new complaint, I would like to know exactly what the issues are.

Mr. Savage: I believe, may it please Your Honor, that counsel in all of his argument to the Court has overlooked the provisions of Paragraph VII of our complaint, which states a good cause of action under the contract of insurance, itself, and alleges that death was caused by an accident and injuries, through external, violent and accidental means, and not the result of the insured's vicious or intemperate conduct.

The Court: Well, unless you claim surprise here, I am inclined to permit the plaintiff to proceed on this complaint as amended orally here, at this time.

Mr. Jarvis: May I have an exception to Your Honor's ruling?

The Court: Yes, you may.

Mr. Jarvis: On the grounds—I won't recite them again—on the grounds of the argument that I have recited.

The Court: Yes, and then we have the question that I think now, in the absence of this jury panel, we might as well dispose of.

The plaintiff in his proof would have to, of course, show the existence of the policy, and the member or the insured being in good standing at the time of the [27] accident. He would have to show the accident and then he would have the burden of showing that the accident resulted independent of any misconduct, as set forth in the policy there, or any contributing cause to his death, and if the trier of the facts, whether it be a court or a jury, believed that then he would be entitled to a recovery. If he did not establish that fact, of course he wouldn't recover.

Now the question that I have in mind at this hour is, on whom does the burden of proof rest, as to the contributing cause of death?

Mr. Savage: Well, it is going to be our position that the burden of showing that death came within any of the provisions or the exceptions in the policy, rests upon the defendant company; when we once show an accident and the death, then we have made a *prima facie* cause.

The Court: But you must show that death followed as a result of the accident.

Mr. Savage: Yes, I should have said that, Your Honor please. Thereafter, I think the burden shifts upon the defendant association to establish by a fair preponderance of the evidence that there was a contribution to that death by reason of some other disease or some bodily condition, and I think the authorities are [28] practically uniform in holding that way, Your Honor.

Mr. Jarvis: Your Honor, I would say that by far the great majority of authorities are to the contrary, and that it is not only upon the plaintiff to prove that the allegations of their complaint and I would like the issues that we have to meet—I would like to know definitely what they are before we go to the further part of this trial—the burden is not only on the plaintiff to prove the allegations of the complaint, but the burden is upon the plaintiff to show that they come within or without the limiting or the excepting clauses of the policy.

(Whereupon, argument by respective counsel).

The Court: The problem,—first you have a contract here that has a provision in it that when there is a death, if some physical defect, or ailment of the insured was a contributing factor, then you would not be entitled to recover. This contract provides that.

Then you have an allegation in your complaint that even remains with your amended complaint, that there was a physical ailment of sufficient significance to require a retirement from the Railway Mail Service.

I am rather inclined to believe that this case is readily distinguishable from what we have ordinarily [29] in the negligence case where there is an allegation of negligence, and there is an answer affirmatively alleging contributory negligence, the burden is on you to show, before you are entitled to recovery, not only this accident but that death resulted from it, and even though the deceased was suffering from the ailment set forth here, the ailment itself would not have caused the death, but neither did the ailment bring about death as a result of the accident, or the injury.

Mr. Savage: Well, is Your Honor finally ruling on it now, or may I, during the noon hour——

The Court: My purpose is, in raising it now, for the purpose of passing upon the other question as to whether or not I should call a jury, and if jury is called, in view of the amendment in the pleadings, I do not think that a jury would be sitting in an advisory capacity.

Mr. Savage: No, I agree with Your Honor.

The Court: I think their decision on the facts would be binding upon the Court, and since the issue of waiver is removed from this case, then we have the single issue of law as to whether there is liability under this contract of insurance, and that is a proper issue to be tried by a jury.

The only reason that there would not be a [30] jury here is that you did not comply with the Federal Rules of Civil Procedure in making a jury demand within the time limit, though your jury demand was made at about the same time that your

reply was filed, but a reply is not a necessary pleading under Federal procedure, and the question as to whether or not, under those circumstances, a jury should be granted or denied, I take it, is one within the discretion of the Court, because the rule is not a mandatory rule. It is a discretionary rule, and I am inclined to grant a jury for the purpose of disposing of these issues as now limited, and your complaint as I understand it, would now read, at least in a general way, it would contain the allegation that you have in Paragraphs I and II, and III, and IV I assume would be stricken.

Mr. Savage: I believe so, Your Honor. That would be our motion.

Mr. Jarvis: May I take an exception to the ruling striking Paragraph IV, Your Honor?

The Court: Yes.

Mr. Jarvis: Without repeating my argument on it?

The Court: Yes, you may have an exception.

Paragraph V would still remain in your amended complaint. [31]

Now, is there any objection on the part of either of the parties to that ruling?

Mr. Savage: I think probably Paragraph VI should be stricken.

The Court: But as to Paragraph V?

Mr. Savage: No objection on our part.

The Court: Paragraph V alleges there was this ailment, but it alleges payments, the contract was in good standing.

Mr. Jarvis: Does that remain, in, Your Honor?

The Court: Yes.

Mr. Jarvis: I have no objection.

The Court: Paragraph VI would be stricken.

Mr. Jarvis: May I have an exception on the order striking Paragraph VI, for the reasons I stated in my argument?

The Court: Well, if there is something in that paragraph that goes beyond the question of waiver, I would like to have you point it out to me.

Mr. Jarvis: I don't like to commit myself, Your Honor, but I don't see any.

The Court: Well, now then, as to Paragraph—

Mr. Jarvis: From a cursory reading—

The Court: As to Paragraph VII, that will remain, and Paragraph VIII, it just deals with the matter [32] of making proof.

Mr. Jarvis: That will remain?

The Court: That will remain, and Paragraph IX will remain.

Now your answer, of course.

Mr. Jarvis: Our answer is a general denial, Your Honor. Legally it is.

Mr. Savage: Doesn't it go further than that?

The Court: Well it is an admission, of course, as to the execution of the insurance contract and the existence of the insurance contract.

Mr. Jarvis: That is admitted, Your Honor.

The Court: And the payments, and I think we have thus simplified the issues substantially, now, and I want to offer to the defendant, again, the opportunity, if he sees fit to do so, to claim surprise by reason of the narrowing of the issues.

Mr. Jarvis: Well, I will say this, Your Honor, that we are not surprised, because——

The Court: Surprised to such an extent as to justify you in moving for a continuance of the case.

Mr. Jarvis: I will say, Your Honor, we were ready to try this case—perfectly ready to try it. We are ready to try it on the theories advanced on plaintiff's complaint. We consider the present theories a radical [33] departure from the theory on which we were prepared. Outside of that element, I do not believe that there is a great deal that would justify us in asking Your Honor, conscientiously asking Your Honor for a continuance.

The Court: I think we will take a recess now for ten minutes, and then you will bring the jury in following that. [34]

JENNIE M. BABBITT,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Savage:

Q. Mrs. Babbitt, tell the Court and jury your full name. A. Jennie M. Babbitt.

Mr. Savage: Will you speak up so the jury and counsel for the defendant can hear you? Speak up clearly.

(Testimony of Jennie M. Babbitt.)

Q. And where do you reside, Mrs. Babbitt?

A. Well—— [47]

Q. Where do you live?

A. I really have no home. I have rented a room, and——

The Court: What I want is the address.

A. (Continuing) ——I give my daughter's address as a permanent address, which is 7117 12th Avenue Northeast.

Q. Are you the widow of Fred I. Babbitt, deceased?

A. I am.

Q. And when did Fred Babbitt die?

A. July 30, 1943.

Q. And where were you living at that time?

A. 4116 Corliss Avenue.

Q. Seattle? A. Seattle.

Q. When were you and Mr. Babbitt married?

A. June 18, 1902.

Q. And where? A. In Abilene, Kansas.

Q. Abilene, Kansas? A. Abilene, Kansas.

Q. That is the General's home? A. Yes.

Q. And ever since your marriage, were you husband and wife, up until the time of his death?

A. Yes.

Q. The bonds of matrimony had never been severed between the [48] two of you? A. No.

Q. And were any children born as an issue of that marriage?

A. We have three children.

Q. And who are they, please?

A. Well Frederick, the oldest one has been in

(Testimony of Jennie M. Babbitt.)

Germany 37 months and is still there. Ardley, my daughter, is in the court room.

Q. Ardley Pettit, is that her name?

A. Ardley Pettit, and Eugene, the youngest son, is in Los Angeles.

Q. Now when did you and Mr. Babbitt remove to the city of Seattle?

A. In 1902. We came right here from Abilene, on our honeymoon.

Q. Now what was Mr. Babbitt's business or profession at the time you two were married?

A. He was a railway mail clerk before we were married, and up until the time of his retirement.

Q. And do you know how long prior to your marriage he had been a railway mail clerk?

A. I couldn't say exactly. He went in in April—it was either 1898 or 1899.

Q. And to the best of your knowledge was he a member in good standing of that organization from 1888 to 1899, up to [49] the time of his death?

A. Yes. [50]

Q. Now during your married life, up until the time of Mr. Babbitt's retirement, state whether he had ever suffered from any illness, Mrs. Babbitt?

A. He had never missed a day's work. He had never asked for——

Mr. Jarvis: Just a minute, you just answer the question.

The Court: The question is, did he?

Q. Had he ever suffered from any operations?

A. No.

(Testimony of Jennie M. Babbitt.)

Q. Had he ever missed a day's work?

A. No.

Q. That is, from the time you two were married up until the time of his retirement, is that right?

A. Yes.

Q. Now, he did retire from the Railway Mail Association—do you know when?

A. Well, it was—I don't know just when the official action went through, but it was in the spring of 1928.

Q. And after his retirement do you know whether he kept up the payments of his dues and assessments to the Railway Mail Association?

A. Yes, very religiously.

Q. And do you know what the amount of the dues were, annually?

A. Well, it was \$3.00 every two months, with very many extra [52] assessments.

Q. Now the dues themselves amounted to \$18.00 a year?

A. Yes.

Q. And in addition to the dues were there assessments?

A. Yes.

Q. And do you know what those assessments amounted to per year, approximately?

A. Well, it seemed about every other time it would be \$6.00, instead of three. I haven't those receipts to verify that?

Q. You don't?

A. No.

Mr. Jarvis: We have them, Mr. Savage.

Mr. Savage: All right.

(Testimony of Jennie M. Babbitt.)

Q. Now, do you recall the morning of July 9, 1943? A. Yes.

Q. Had there been any change in the condition of Mr. Babbitt's health for—say several weeks prior to that morning? A. None.

Q. Now, what occurred on that morning, Mrs. Babbitt? A. Well, we were——

Mr. Savage: A little louder, please, we so can all hear.

A. Well, it was July 9th, and he would have been 70 years [53]

Q. Now, just what occurred, that particular morning?

A. Well, we both got up about the same time.

Q. Where were you?

A. We were in the bedroom.

Q. In your family home?

A. In the family home, and he was—he had a chair that faced the bed, such as you might face the bed here (illustrating), and I was sitting in the chair.

Mr. Savage: Now let me interrupt you. When you say “here”, the reporter is not able to get down the [54] distance, or the way the bed ran.

Q. Now, in what direction did your bed run?

A. It ran from west to east.

Q. West to east. Now was it in a corner, or was it out from the corner?

A. It was out from the corner. He was facing—the bed facing south, and I was to the left of

(Testimony of Jennie M. Babbitt.)

him, which would be the east, about six feet, difference.

Q. Well, now, were you both on the west side of the bed? A. Yes.

Q. Tell the Court and the jury whether you were able to see what occurred?

A. No, we were both on the north side of the bed.

Q. North side of the bed? A. Yes.

Q. And were you able to see what occurred at that time and that place? A. Oh, yes.

Q. Now tell the Court and jury exactly what happened.

A. Well, I had just finished dressing. I was sitting in this chair, not more than six feet away, and he had stood up and pulled on his long underwear before he stood up, and then as he—after he stood up—should I show you?

Q. Yes, stand right up.

A. As he stood up this way (illustrating), facing the bed to [55] pull on the arms of the long underwear, he turned this way (illustrating) to get the sleeve in on the first side. The rug was loose at that corner on the polished floor, and I saw him slip on the rug just as if it was taken out from under his feet. He fell full length, without any support or help, or anything—just fell full length. He was in very great agony.

Q. Now let me ask you what part of his body struck the floor?

A. Well his hip struck the floor.

(Testimony of Jennie M. Babbitt.)

Q. Which hip, right or left hip?

A. It would be the left hip.

Q. Would you say that was a slump, or slip, or a fall?

A. No, that was a fall, that the rug slipped out from under his feet.

Mr. Jarvis: Just a minute, I object.

Q. Did you see the rug slip?

A. I saw the rug slip. I saw his feet twist on the rug. The rug was loose on that corner. I saw him fall.

Q. All right then, what did you do after he had fallen?

A. Well of course I rushed to his side, and he was in very great agony, and he said "oh", his leg was broken—his leg was broken.

Mr. Savage: Talk to the jury so they can hear you, please. [56]

A. (Continuing) And so I said "oh". I thought perhaps it was just bruised. I rushed to the bathroom and got a cloth of cold water to put on his forehead, and then tried to lift him and I couldn't lift him, and there was a roomer just across the hall, and——

Mr. Savage: A little louder, please, Mrs. Babbitt. I can scarcely hear you.

A. (Continuing) We rented a room to a man just across the hall. There was four bedrooms in the house. This was just across the hall to the left. I rushed there and knocked on the door, and I think it was Mr. Webber, and asked him to come and help

(Testimony of Jennie M. Babbitt.)

me get Mr. Babbitt in bed, he had a terrible accident, and he mostly lifted him and put him in bed. He was just ready to leave for work, and left immediately.

Q. Do you know where Mr. Webber is now?

A. He was in Denver. He was in the Port of Embarkation. He has gone back there, to the best of my knowledge.

Q. Now tell us whether there was any change in color on Mr. Babbitt's face?

A. Oh, yes, he was deathly pale.

Q. And did you have a look at his leg or his hip after he had been put into bed?

A. Yes, I put the electric hot pad on it.

Q. Did you notice any difference in shape or alignment of his [57] leg?

A. It was more of alignment. It looked crooked.

Q. It looked crooked to you. Did you notice any bumps or bruises on his body, or his arms, or his face?

A. No, not that I remember.

Q. After that, did you call your daughter, Mrs. Pettit, to come to your place?

A. Yes, I rushed downstairs and I called my daughter and told her her dad had had a terrible accident.

Mr. Savage. You are not permitted to say what you discussed with your daughter.

Q. Did she come to the premises?

A. She came at once.

Q. What occurred after Mrs. Pettit arrived?

A. Well, he insisted on getting up. He said "I

(Testimony of Jennie M. Babbitt.)

haven't spent a day in bed yet, and I am not going to begin now," and he insisted on getting up, and much to our protest, why, we helped him and he got up on a chair, and then he fainted completely. He was in a dead faint, and we two were able to get him back in bed.

Q. What can you say as to his color when he fell into a faint?

A. He was very gray,—just death-like.

Q. Now what occurred after he was put back into bed by you and your daughter, Mrs. Pettit?

A. Well, my daughter says, "Well, I am calling the doctor." We knew that Doc Palmer did not go out to the house.

Mr. Savage: I do not think you are entitled to detail a conversation that way.

Q. Now, just what did occur, Mrs. Babbitt?

A. Well, I called Doctor Palmer and I described to him what had happened, and he said, "Well, it sounds like a broken hip. I will have the ambulance there in twenty minutes," and he did.

Q. And what was done with Mr. Babbitt?

A. He was put on a stretcher and taken out by the ambulance service, and I rode with him in the ambulance to the Seattle General.

Q. And what was done with him, if you know, after he was taken in to the Seattle General?

A. Well, I went with him to the X-ray room and he was put out on the table where they take X-rays, and I stayed right beside him.

(Testimony of Jennie M. Babbitt.)

Q. You were there when X-ray pictures were taken of him?

A. I was there when X-ray pictures were taken of him.

Q. What else did you see or witness?

A. I saw the X-ray pictures as soon as developed. He did not want to go home——

Mr. Jarvis: If the witness will confine herself to the question. [59]

Mr. Savage: All right, we will try to keep within the limits.

Mr. Jarvis: I don't want to make objections——

Mr. Savage: I understand, Dave. Neither do I.

Q. Now you say you saw the X-ray pictures after they were developed? A. Yes.

Q. And was the meaning of those pictures explained to you?

A. Well, they were not only explained, but they were visible.

Q. Now, what was done with Mr. Babbitt after that?

A. Well, he was taken up to the second floor and put in a bed—a hospital bed.

Q. And now was his leg and hip—leg or hip, or both, ever placed in a cast?

A. The next morning at 8:00 o'clock Doctor Palmer and his son operated on him and put him in this—what they call a traction splint.

Q. That is Doctor Don Palmer and Doctor Rex Palmer? A. Yes, sir.

(Testimony of Jennie M. Babbitt.)

Q. Were you there when that operation was performed?

A. Yes, sir, I was in the hospital. I was not in the operating room.

Q. Did you see him after the leg and hip had been placed in [60] a traction cast?

A. Yes, just as soon as he came downstairs and put back in bed, I saw him immediately.

Q. Did you see the cast?

A. I saw the cast.

Q. What else did you see about, or around, or appertaining to the cast?

A. Well, there was a spike driven between each leg and this big square frame put on between—or on the ends of his feet, and Doctor Palmer explained to me how they would screw up on one side or the other, in order to pull it.

Q. All right, now, you did see the frame, the cast and the spikes driven through the two legs—you saw that yourself?

A. I saw that.

Q. And did you visit Mr. Babbitt while he was in the hospital?

A. I was there every day, and most of the day.

Q. And what was his condition for four or five days?

A. Well, he was in very good spirit when he came down from the operating room. He was in surprising good spirits, and the doctor said that he had been bantering and joking and talking all through the spinal anesthetic, all during the operation.

(Testimony of Jennie M. Babbitt.)

Q. And how long did that condition continue, Mrs. Babbitt? [61]

A. Well, he was not so well on Sunday. This happened Saturday morning. He was not quite so well on Sunday, and on Monday not quite so well. We brought down all his birthday presents, but he was not interested, and——

Mr. Savage: Just take your time, now.

Q. When was it, Mrs. Babbitt, when you noticed a decided change in his condition, if you did notice such a change?

A. Well, he got better after Monday, and on Tuesday or Thursday, I brought to him this application for accident insurance.

Q. Now, did you give any notice to any of the officials of the Railway Mail Association that he had suffered an accident?

A. Yes, I called up Mr. Matthews, the treasurer, and told him about the accident, and he sent me the papers to fill out for the accident, with the Doctor's description.

Q. Yes. All right, now, you say you took those papers down to your husband at the hospital?

A. Yes, I took them to him and I wrote out what had occurred and he signed it. He was laying on his back, of course.

Mr. Jarvis: Just answer the question, if you will, Mrs. Babbitt.

Mr. Savage: Go right ahead, Mrs. Babbitt.

A. And he signed it, and then I took it to Doc-

(Testimony of Jennie M. Babbitt.)

tor Palmer [62] for his part of filling in the description of the accident.

Q. All right. Now coming back to Mr. Babbitt's condition, did you at any time notice any decided change in his condition?

A. Well, Saturday morning at 8:00 o'clock Doctor Palmer called me up and he says, "Something has happened, we don't know what it is, and you come down at once."

Mr. Jarvis: Your Honor, I don't want to object——

Mr. Savage: I have no objection that be stricken.

The Court: We want questions and answers, and I want to be as liberal as possible in eliciting the facts. You should be as careful as possible in answering the question.

Q. Did you go down to the hospital Saturday morning?

A. Yes, sir.

Q. And what time did you arrive?

A. Well, as soon as I could get there, between 9:00 and 10:00.

Q. And what was Mr. Babbitt's condition at that time?

A. He couldn't open his eyes or speak.

The Court: Now, was that the Saturday following the accident, or a week later?

Mr. Savage: Just a week later. [63]

Q. You say he couldn't open his eyes, or speak?

A. No.

Q. Well, did he get any better from that condition, or did he get worse?

(Testimony of Jennie M. Babbitt.)

A. He grew steadily worse.

Q. And on what day did he die?

A. July 30, just three weeks to the day after the accident.

Q. Were you there at the time?

A. I was not at the hospital at the time of his death.

Q. Now in addition to his—I believe you testified to his inability to open his eyes or to speak. Did he have any other physical difficulty which you observed?

A. Well, he couldn't feed himself. I went down to feed him every meal.

Q. He couldn't feed himself. What about his breathing? Did you notice anything about his breathing?

A. Well, after this Saturday, why then his breathing became very harsh, and——

Q. What about the rapidity of the breathing, did you notice any change in how fast he breathed?

Mr. Jarvis: Your Honor, the witness is not an expert witness. I object to the question.

The Court: I think she may answer.

Mr. Savage: It does not take an expert to count respiration. [64]

A. Well, he was laboring under——

The Court: Talk to the jury now.

A. Well, he was laboring under very great——

Q. Answer my question, did you notice whether he breathed fast or not?

A. I noticed a laboring breath.

(Testimony of Jennie M. Babbitt.)

Q. You noticed a laboring breath?

A. Yes.

Q. You did not count the respiration, in order to tell whether he was breathing fast or not, is that right? A. Yes.

Q. Now, after Mr. Babbitt's death, did you notify any of the officers of the Railway Mail Association that he had passed away?

A. I don't remember whether I did or not.

Q. Well, directing your attention specifically to one individual, did you or did you not notify Mr. Chaplin that your husband had passed away?

A. I saw Mr. Chaplin on Sunday, and I don't know whether I saw him on Saturday or not.

Q. Well, I mean at any time after his death, whether it was Saturday or Sunday, or a day or two later. Did you notify any officer that your husband had died?

A. I don't know, I don't remember.

Mr. Savage: You don't remember that. [65]

Mr. Jarvis: I have the record on it here, and I will take off the part that relates to the rejection of the claim.

Mr. Savage: We allege in Paragraph VIII of the Complaint:

"Within sixty days after the death of Fred I. Babbitt, the plaintiff, as beneficiary under the said certificate, notified G. K. Chaplin, the branch president of the defendant, of the death of Fred I. Babbitt, and filed her proof of claim on the forms provided by the defendant, which the Committee of

(Testimony of Jennie M. Babbitt.)

Claims of the defendant disallowed. Thereupon, the plaintiff appealed to the National Executive Committee of the defendant, and on October 21, 1943, by a vote of seventeen to two, the defendant rejected the claim of the plaintiff and so advised her."

Defendant in his answer says:

"Answering paragraph eight, admits the allegations therein contained."

The Court: Yes, I think that is correct. Of course there is no need to make proof on that.

Q. Then I ask you if you did, prior to the time that this action was instituted, receive any money from the defendant Railway Mail Association, as beneficiary on the [70] policy of insurance?

Mr. Jarvis: What was your Honor's ruling on that last——

The Court: Upon the preceding one, there is no need to make proof on it, because that is not an issue.

Mr. Jarvis: There is no need to make proof?

The Court: On the fact that a claim was filed within the sixty days, and that the claim was rejected. Proof of claim was submitted and the Committee on Claims of the defendant disallowed it, and then the defendant appealed to the national Executive Committee of the defendant, and on October 21, 1943, by a vote of seventeen to two, the defendant rejected the claim. Now that is admitted in the answer.

Answering paragraph eight—I am reading from

(Testimony of Jennie M. Babbitt.)

the answer now—admits the allegations therein contained.

Mr. Savage: Now, will you answer my question as to whether you ever received a payment of four thousand dollars or any part thereof, from the Railway Mail Association on this beneficiary certificate?

A. No.

Q. How long have you known Mr. Chaplin?

A. I never saw him until he came to the house at the time of my husband's—just before the funeral. [71]

Q. Do you know whether he held any office in the Seattle branch or division of the Railway Mail Association at that time?

A. He told me at that time that he was president.

Q. And how long have you known Mr. Matthews? A. Well, a good many years.

Q. Well, when you say “a good many,” that means something to you and something else to the jurors. A. About twenty-five.

Q. About 25 years, and do you know whether he held any office in the Railway Mail Association in the Seattle branch or division?

A. He was treasurer.

Q. And do you know for how long a period of time he held that office?

A. I don't know the period of time.

Q. Did Mr. Matthews, after your husband had retired from the railway mail service, visit——

A. He did.

Q. (Continuing): ——your husband in your

(Testimony of Jennie M. Babbitt.)

home. Did he on those visits ever collect any of the dues or assessments which had been levied by the Railway Mail Association? A. He did.

Q. He did, and did you, yourself, on other occasions pay these dues and assessments? [72]

A. I never paid them.

Q. You never did. Did you ever take Mr. Babbitt to the office to pay them?

A. My son took him to Mr. Matthews' home.

Q. I see. Now after Mr. Babbitt's death, state whether Mr. Chaplin came to your home to investigate the circumstances of the alleged fall and accident?

Mr. Jarvis: Just a minute, your Honor, I object to the form of the question as incompetent, irrelevant and immaterial.

The Court: Objection will be overruled, exception allowed.

Q. Did Mr. Chaplin come to your home to talk to you about the circumstances of the alleged accident? A. Yes, he and another man.

Q. And do you know who the other man was?

A. I think it was Mr. North, but I had never seen him before.

Q. And how long was that after your husband's death?

A. Oh, it was within a week. I don't know the exact time.

Q. And what was said between you and Mr. Chaplin at that time?

A. He said he wanted to see the conditions. I took him up the stairs—— [73]

FRANK W. FELLS,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Savage:

Q. Will you tell the Court and jury your full name? A. Frank W. Fells.

Q. Frank W. F-e-l-l-s? A. Right.

Q. And what is your business, Mr. Fells?

A. Business manager of the Seattle General Hospital.

Q. And how long have you been the business manager of the Seattle General Hospital?

A. Going on fourteen years.

Q. Fourteen years? A. Yes.

Q. And in your capacity as general manager of that hospital, are the hospital records under your general supervision? Do you have general custody of them? A. Yes, sir.

Q. Now in response to a subpoena duces tecum, have you brought with you X-rays and clinical reports—that is, the clinical reports and X-rays appertaining to Fred I. Babbitt? [77]

A. Yes I have.

Mr. Savage: May I have them, please?

Q. These are a part of the permanent records of the Seattle General Hospital?

A. That is right.

(Testimony of Frank W. Fells.)

Q. And are kept in the regular course of your business as a general hospital, is that right?

A. Yes, sir.

Q. Now you don't know anything about the details of the exhibit, what they contain—that is, you did not write them up or take the X-ray pictures, is that right?

A. Yes, sir.

Mr. Savage: You may cross-examine.

Cross Examination

By Mr. Jarvis:

Q. You have no personal knowledge of the contents, Mr. Fells?

A. No.

Q. You don't know what doctors or technicians prepared those, do you?

A. No.

Q. You just took them out of the file in the hospital?

A. I had the record clerk in charge take them out.

Q. You did not do it yourself? [78]

A. No.

The Court: As I understand, you have offered them?

Mr. Savage: Not yet, no. That is all.

(Witness excused.) [79]

JENNIE M. BABBITT,

recalled as a witness on behalf of the Plaintiff, was examined further and testified as follows:

Cross Examination

Q. Well, how many times a month would he have difficulty?

A. Well, I don't know as it was ever regularly established.

Q. Did he have difficulty walking?

A. Yes.

Q. Was he able to put his foot down where he wished to place it?

A. Yes, he could always stand up and balance himself. This was not evident at the beginning, but it was the last few years. He could always stand up and balance himself, but before he started to walk he would put his hand on something to balance himself as he walked.

Q. In other words, during the last few years of his life, before he took a step he had to have some support?

A. When he started to walk, but he was never helpless.

Q. Well, I am not asking whether he was helpless or not. I am asking about this walking difficulty. Could he walk up and downstairs without assistance?

A. Well, he took ahold of the bannister. He walked up and down the stairs night and morning, and through the house—four rooms, back and forth to his meals, and to the front porch.

(Testimony of Jennie M. Babbitt.)

Q. But when he took a step did he have to take ahold of the bannister, or the wall, or the side of something to assist him? [87]

A. Yes, after he would stand up and balance himself, in order to walk he would have to put his hand on a chair or on a table to walk.

Q. So he couldn't take any step at all without assisting himself?

A. Oh, yes, he could take a few steps, but he couldn't walk across the room without, as I say, putting his hand from the table to the chair, and walking across, but he was never helpless.

Q. Did his legs bother him by shaking, or——

A. No, he had no pain whatever.

Q. I am not asking you about pain. I am asking, did they shake at times?

A. Well, I don't know as you would call it that they would shake. It was the instability in walking. When he started to take a step he would have to put his hand out to assist him.

Q. They were unsteady?

A. When he walked.

Mr. Savage: Just a moment, I object. She did not say that. That was not her testimony. That was the testimony of counsel.

The Court: She can answer "yes" or "no."

Q. And how long had that condition been most pronounced before his death, Mrs. Babbitt? [88]

A. Well, I suppose the last eight to five years that he had been in that condition.

DR. DON H. PALMER,

produced as a witness on behalf of the Plaintiff,
after being first duly sworn was examined and
testified as follows:

Direct Examination

By Mr. Savage:

Q. Your name is Doctor Don H. Palmer?

A. Yes, sir.

Q. And where do you reside, Doctor Palmer?

A. Seattle.

Q. And what is your address?

A. 6956 55th Avenue South.

Q. And you have been duly and regularly admitted to practice medicine in the state of Washington?

A. Yes, sir.

Q. And where is your office?

A. In the Medical Arts Building, Second and Seneca Street.

Q. Are you a member of any of the boards of our Seattle hospitals?

A. Yes, sir.

Q. Which ones?

A. Well, I work in all the hospitals, but I work principally in the Seattle General Hospital and on the staff of several hospitals here.

Q. Have you any specialty, Doctor? [91]

A. General surgery.

Q. And do you, or do you not also specialize in plastic surgery?

A. Yes, sir.

Q. Have you had any special experience in the matter of treating wounds and injuries?

A. Well, I think I have had more than the average individual.

(Testimony of Dr. Don H. Palmer.)

Q. Well, were you not for a long time, and are you still not, shall we say, consulting physician and surgeon for the University of Washington?

A. That is a hobby I have had for many years.

Q. You treat the young men out there for the injuries they sustain in their athletics, is that not right?

A. For forty years I have been doing that.

Q. Do you know the plaintiff, Jennie Babbitt?

A. Yes, sir.

Q. For how long have you known her?

A. Well, since about the time I started to practice medicine.

Q. How long ago was that, Doctor?

A. 1903.

Q. And did you know her husband, Fred Babbitt?

A. Very well. He was my landlord when I first started to practice medicine.

Q. You say he was your landlord when you first started to practice medicine? [92]

A. Yes, sir.

Q. Were you or were you not their family physician? A. Yes, I was for many years.

Q. Do you recall, Doctor, or are you able to tell now, when you were first called upon to treat Fred Babbitt for any disease or disability?

A. Well, it was some time prior to 1926. I have a record that goes back to 1926, and I did not have time to look up anything before that time.

Q. And are you able to tell the Court and jury

(Testimony of Dr. Don H. Palmer.)

for what disease or disability you treated him at that time? A. Yes, sir.

Q. And what was that disease or disability, in your opinion, Doctor?

A. He was having some muscular weakness in his legs—having some disability in doing his work as a railway postal clerk. He was complaining of loss of power control, particularly of his legs. This was dated February——

Mr. Savage: Just a moment.

Mr. Jarvis: Are you reading from something?

A. I was just getting the date here.

Mr. Jarvis: Could I ask you what you were reading from?

Mr. Savage: He said he was just getting the date. [93]

Mr. Jarvis: That is true.

A. I don't need it.

The Court: Doctor, tell counsel what you hold in your hands, since he inquired.

A. It is my own office record.

Mr. Jarvis: That is all I wanted to know.

The Court: You may use that.

Mr. Savage: Proceed, Doctor. If you want to use that to refresh your recollection, you may do so.

A. (Continuing): He had been in prior to February, 1926, for small things, but, as I say, I did not look up that record. This record is dated February, 1926, and at that time he was complaining of loss of power and control of his legs. He

(Testimony of Dr. Don H. Palmer.)

said that it had been developing for the past six months.

Mr. Jarvis: Just a little louder, please.

A. (Continuing): He said it had been developing for the past six months.

Mr. Jarvis: That was in '26, you say?

A. That was in 1926, February. He walked with his feet quite wide apart—had a rather spastic gait.

Q. Now when you say “a rather spastic gait,” what does that mean?

A. Well, that is a peculiar gait. When he moved his feet he would move them rather rapidly when he walked, with his [94] feet wide apart, much like this (demonstrating), as one will walk if they are—if they tend to be at all uncertain.

Q. What would you say with respect to his stability, Doctor?

A. He was perfectly stable.

Q. Now, did you diagnose his disease or disability at that time?

A. Yes.

Q. And did you testify as to what it was?

A. Yes.

Q. What was it, Doctor?

A. It was a sclerosis of the cord.

Q. Sclerosis of the cord?

A. The spinal cord, yes.

Q. Would that be a multiple sclerosis?

A. Yes, it comes under that heading.

Q. Now, Doctor, as a result of that disease or disability, do you know whether he retired from active service as a railway mail clerk?

(Testimony of Dr. Don H. Palmer.)

A. Yes, he did.

Q. Do you know, Doctor, whether he made a claim upon the Railway Mail Association for disability due to an accident at that time?

A. I don't recall that particular thing.

Mr. Jarvis: Your Honor, I think the record [95] better go in evidence if the Doctor is going to read from it, which he has been up to the present time.

Mr. Savage: I had not noticed he read from it.

Mr. Jarvis: I ask that the record be put in evidence.

The Court: There may be some matters in the Doctor's notes that would not be relevant. I would hesitate to make a ruling that he should submit——

Mr. Jarvis: I ask if he is going to testify from it that it be put in evidence so we will be permitted to look at it.

The Court: He has a right to use his notes for the purpose of refreshing his memory, and you would have a right to look at them to see whether he was refreshing his memory, but I do not think they would be an exhibit in the case.

Mr. Jarvis: Unless they are material.

Mr. Savage: Well, that will be a part of counsel's own case.

Mr. Jarvis: I ask that we be permitted to look at them at a convenient time.

The Court: If he reads from them.

Mr. Jarvis: He already has.

Mr. Savage: That is a matter we deny. [96]

(Testimony of Dr. Don H. Palmer.)

Mr. Jarvis: Well, he just did it a little while ago, your Honor.

The Court: He fixed the date—he used the record for the purpose of fixing the date, and it is your contention that the record is wrong, or——

Mr. Jarvis: No, it is not my contention. If he is testifying from the record, your Honor, we ought to be able to look at it.

The Court: Of course it is not such a record as would be admissible in evidence of itself, because it is a private memorandum or notes of the physician in the keeping of a history of his patient, and if there is some particular phase of it that he refreshes his memory from, and you want to see the notes on that, the Court will permit that. Let's proceed.

Q. Doctor, coming down to the date of July 9, 1943, did you see Fred I. Babbitt that day?

A. Yes.

Q. Where? A. Seattle General Hospital.

Q. Do you know how he got to the Seattle General Hospital? A. Taken in an ambulance.

Q. And do you know who sent for the ambulance? A. Pardon.

Q. Do you know who sent the ambulance out there? [97]

A. Oh, no, that would be a technicality. Anybody could 'phone for an ambulance.

Q. And did you examine him at that time?

A. Yes.

Q. And of what did the examination consist, Doctor?

(Testimony of Dr. Don H. Palmer.)

A. General examination. He was complaining of trouble in his hip.

Q. And did you have an X-ray picture taken of the hip? A. Yes.

Q. And after examining him and consulting all the information you received—looking at the X-ray, did you make a diagnosis of his disability? [98]

A. Yes.

Q. And what was that diagnosis, Doctor?

A. Fracture of his hip.

Q. Now, what was done? What treatment was given him?

A. Well, we reduced his fracture and put him in what is known as a well leg splint.

Q. Doctor, I am not familiar with a well leg splint, but describe it for us, please.

A. Well, it is a mechanical apparatus that is devised to create a pull on the injured leg, and in order to get that pull from the injured leg, the well leg is put in a splint so that the knee will not bend. If you had a blackboard I could perhaps draw it better than I can explain it, but—if I can borrow somebody's fingers here, maybe I can show you what I mean.

Q. Sit there and draw it for us, Doctor.

Mr. Jarvis: Your Honor, I don't know how this is going in the record.

Mr. Savage: We will mark it on the paper.

A. I will take your hand.

Q. Show me, Doctor.

(Testimony of Dr. Don H. Palmer.)

Mr. Jarvis: Your Honor, may I interrupt? How is this exhibit going in the record?

The Court: Well of course it can't except by word description, but then of course he can demonstrate—the [99] Court will permit him to demonstrate it, because, after all, this is not the crux of this case.

A. Now, we will say we want to get a pull. [100]

Q. Now, Doctor, were you able to get a good reduction of the fracture? A. Yes.

Mr. Jarvis: Your Honor, I object to that as hearsay.

The Court: Objection will be overruled.

Q. Now, Doctor, did you arrive at any conclusion as to the cause of death? A. Yes.

Q. What in your opinion did cause the death of Fred I. Babbitt? [104]

A. He died from a fractured femur with complications. [105]

Q. Well, Doctor, tell the Court and Jury whether in your opinion—whether or not Fred I. Babbitt died of a fat embolus which went to his lung and his brain?

Mr. Jarvis: Your Honor—just a minute, I object to that question on the ground that the witness is not permitted to testify as to the matter that must be decided by the jury, and that has been so decided.

The Court: Objection will be overruled. [107]

Q. Now, Doctor, assume that Fred I. Babbitt was suffering from multiple sclerosis, or a transverse myelitis, and he had had an accidental fall,

(Testimony of Dr. Don H. Palmer.)

with a fracture of the femur, and a terminal death due to a fat embolus going to the lung and the brain, in your opinion, would the multiple sclerosis or transverse myelitis be a contributing cause of death? A. No. [108]

Q. If Fred I. Babbitt had never been afflicted with multiple sclerosis or transverse myelitis, and he had sustained a fall in which the large bone, or femur was fractured—sustained a comminuted fracture, which is broken up—in your opinion would death have probably resulted anyway?

A. Yes. [109]

Mr. Jarvis: I ask that that answer be stricken, your Honor, on the same grounds. I want to preserve that record.

Mr. Savage: You may cross examine.

Cross Examination

By Mr. Jarvis:

Q. Doctor, you say that—or you gave your opinion that a fat embolus to the brain or the lungs——

The Witness: Just a little louder, please.

Q. (Continuing): I say, you gave your opinion that a fat embolus to the lungs caused Mr. Babbitt's death.

A. A fat embolus would not go directly to the brain. It would go to the lungs, and secondarily from the lungs the embolus would go to the brain.

Q. Now, did you see that fat embolus yourself?

A. No.

Q. Did you see it—any evidence of a hemorrhage in the brain? A. No.

(Testimony of Dr. Don H. Palmer.)

Q. Did you see any evidence of a hemorrhage in the lungs? A. No.

Q. You can't tell of your own knowledge that a hemorrhage to the lungs or a hemorrhage to the brain caused the death? A. Oh, yes, I can.

Q. And then it customarily becomes worse?

A. No, they usually die of some intercurrent disease.

Q. Does the multiple sclerosis contribute to the death? A. Not necessarily.

Q. Does it weaken a person?

A. Does it what?

Q. Does it weaken a person?

A. Yes, it weakens them as far as certain muscular efforts are concerned.

Q. Does it make them more susceptible to death by extraneous causes?

A. No, except in the case of an individual that was bedridden. For instance, if there was a fire in the house, he would have a hard time getting out—more so than somebody who could walk.

Q. Would you say they are normal, healthy people? A person who is suffering from multiple sclerosis, is he a normal or healthy person?

A. Yes.

Q. What? You say he is healthy?

A. Healthy, yes.

Q. What is your experience of the average course or length of that disease?

A. Well, it runs for a period of years. I don't know how long—ten or fifteen years, or more. [116]

JENNIE M. BABBITT

resumed the stand for further cross examination and testified as follows:

Cross Examination—(Resumed)

By Mr. Jarvis:

Q. That was about 7:00 o'clock in the morning?

A. About 7:00 o'clock.

Q. And where is your room with relation to the kitchen? A. It is upstairs.

Q. Had you been in the kitchen that morning?

A. No.

Q. You had not been downstairs at all?

A. I had not left the room.

Q. Where were you in the room?

A. I was sitting beside my bed on a chair. I think I was tying my shoes, though I don't recollect exactly.

Q. You were tying your shoes?

A. Well, I—that is, to the best of my recollection.

Q. How far away from Mr. Babbitt were you?

A. Well, I should estimate six feet.

Q. And which way were you looking, Mrs. Babbitt?

A. Well, he was standing up and I don't know as I was particularly watching him, but I was conscious of what he was doing.

Q. Well, you say you don't know whether you were particularly watching him. You mean your eyes were on him or on some other object?

(Testimony of Jennie M. Babbitt.)

A. Well, I would say my eyes were on him.

Q. Well, what do you mean by "not particularly watching him?" [133]

A. Well, he always dressed alone. I had no object in watching him dress.

Q. Did you observe any particular movement before he fell?

A. Yes, I distinctly saw that twist of his feet on that loose part of the rug.

Q. You saw a twist of his feet on the corner of the rug?

A. The loose rug, and as he turned, why his feet twisted with him; the rug twisted under his feet.

Q. Were you particularly watching that?

A. Well, I saw it.

Q. Your eyes were on the floor?

A. Well, I can't say that they were. I saw this movement.

Q. Were your eyes on his face or on his feet?

A. Well, the whole movement attracted my attention, the twisting of his feet on the loose corner of the rug.

Q. You were about six feet away from him?

A. Well, approximately that. I was sitting here (illustrating) and he was facing his way.

Q. By facing this way, you mean?

A. He was facing the south.

Q. He was facing south and there was no window on the north wall?

(Testimony of Jennie M. Babbitt.)

A. Yes, there is a window on the north wall. I was near the east wall, to his left.

Q. And the chair that you were sitting in, was that near the [134] east wall?

A. Yes, near the east wall.

Q. And was Mr. Babbitt, you say, was facing south?

A. He was facing the bed—facing the south.

Q. And you were facing which way?

A. I was facing west.

Q. Was he sitting on the bed?

A. No, he was sitting on a chair.

Q. Was the chair beside the bed?

A. The chair was beside the bed, such as this might be, facing the bed.

Q. Facing the bed?

A. Facing the bed.

Q. He had gotten out of the bed and gotten into the chair?

A. He had gotten out of the chair and pulled on the long underwear over his feet and legs.

Q. Was he standing or was he sitting?

A. He sat down to pull on the long underwear. Then he stood up to pull it up and to put the arm in, and as he turned to put this left arm in, the rug slipped under his feet and he fell full length, almost at my feet.

Q. Was the chair on the rug or on the floor?

A. It was on the rug.

Q. How much of the rug did the chair occupy?

A. Well, it was what you call a scatter rug. It

(Testimony of Jennie M. Babbitt.)

didn't [135] cover the floor, and the Chair was—and the rug occupied almost the space from the bed to the window. I think it would be perhaps a three by six rug. [136]

Q. Which corner of the rug was—did you notice was un-tacked? [138]

A. Well, if this is north and this is south (illustrating), it was the southeast corner.

Q. And whereabouts on the rug was the chair?

A. Oh, it was near the middle of it.

Q. Was the entire chair on the rug or partly on the rug and partly off the rug?

A. It was entirely on the rug.

Q. It was entirely on the rug, and did the chair—the chair was an ordinary chair?

A. It was a chair with arms on it.

Q. Yes, and had four legs, or did it have a different kind of a base?

A. It was a rocking chair.

Q. A rocking chair. Was Mr. Babbitt rocking in it at the time of this accident?

Mr. Savage: Just a moment, if Your Honor please, the testimony——

The Court: I will sustain the objection to the question.

Q. Was the chair in movement? Did you observe the chair in any movement?

A. Not at all, he was standing up.

Q. Was he in front of the chair?

A. He was in front of the chair.

Q. And had he been sitting in the chair? [139]

(Testimony of Jennie M. Babbitt.)

A. He had to pull on the legs.

Mr. Jarvis: Pardon me?

A. He had been sitting in the chair to pull on the legs of this long union suit.

Q. Well, did he have ahold of anything at that time? A. No, he stood up.

Q. And his hands, you say, were pulling on the union suit?

A. Yes, he put one arm in and he turned to put the left arm in.

Q. You observed that yourself?

A. I did, myself.

Q. Did the chair interfere with your vision, at all? A. Not at all.

Q. Were his legs apart or were they together?

A. Well, he had just stood up and was perfectly steady, standing up.

Q. Did he have any shoes or slippers on?

A. No.

Q. Were his feet bare?

A. He was in his bare feet.

Q. He didn't have socks on, either? A. No.

Q. Did he have any other part of his clothes on?

A. No.

Q. Mrs. Babbitt, did he fall forward or backward? [140] A. He fell to one side.

Q. Which side did he fall towards?

A. Well, it would be the left side he went down. He was facing the south, and he fell to the side on the rug.

Q. Was he facing the chair or——

(Testimony of Jennie M. Babbitt.)

A. He was facing the bed, and the chair was behind him. He stood up and had put on his——

Q. Then he was facing north, wasn't he?

A. No, he was facing south. His back was to the north. The window was to the north.

Q. His back was toward the north and the chair was between him and the window?

A. Yes.

Q. And then was facing towards the bed?

A. Yes.

Q. There was no other rug in the room, I understand.

A. There was no what?

Q. No other rug in the room.

A. Yes, there was another scatter rug to the other side.

Q. And when he fell, he fell towards you?

A. He fell towards me, yes.

Q. Did you notice any unsteadiness in his feet at that time?

A. No, he was perfectly balanced and firm at that time?

A. No, he was perfectly balanced and firm at that time.

Q. Was he taking a step or any movement?

A. No. [141]

Mr. Savage: Pardon me. I didn't hear the answer. What was your answer to that question?

A. He didn't take any step. He just stood up.

Q. And he made no voluntary movement at all?

A. Except to turn to put his left arm into the arm of the underwear.

(Testimony of Jennie M. Babbitt.)

Q. That is, he turned his body?

A. Well, he turned, and the rug slipped under him, and he didn't get the arm in.

Q. Now what doctor did you call, Mrs. Babbitt?

A. I called Doctor Don Palmer.

Q. And what doctor responded to your call?

A. Doctor Palmer.

Q. Was it Don Palmer?

A. Doctor Don Palmer.

Q. Did he come to the house? A. No.

Q. You met him in the Seattle General Hospital? A. Yes.

Q. Shortly after Mr. Babbitt was taken to the hospital? A. Yes.

Q. Was Doctor Rex Palmer your physician also in this matter?

A. He was never my physician. He helped his father, but I never called him. [142]

Q. Did you ever see him attending to Mr. Babbitt?

A. He and his father generally came in the hospital together, often, when I was there.

Q. They both came together? A. Yes.

Q. You mentioned some kind of a medical proof of death, and you procured that and gave it to some one of the local officers of this association. Do you remember testifying to that effect?

A. Not proof of death.

Q. Not a proof of death, but proof of disability.

A. No, I never. I never made any—it was through my attorney that such an appeal was made.

(Testimony of Jennie M. Babbitt.)

Q. Didn't you sign a proof of disability of some kind? A. You mean at that time?

Q. Yes.

A. I signed an order for an autopsy.

Q. No, no, but long before then, Mrs. Babbitt. You have testified in your direct examination that you signed some proof of disability.

A. Oh, the application for accident insurance?

Q. Yes.

A. Yes, while Mr. Babbitt was in the hospital, when I called up Mr. Matthews and told him that Mr. Babbitt had had a very serious accident, and he sent me the [143] blanks to fill out, applying for accident benefits, and Mr. Babbitt signed it, and then I took it to Doctor Palmer for the medical description required on the application.

Q. Which doctor did you take it to?

A. Doctor Don Palmer.

Q. And then what did you do with it?

A. That is the last I ever saw of it. I don't know what became of it.

Q. Did you give it to Mr. Matthews or to any of the other officers of the association?

A. Doctor Palmer's secretary took care of it. I didn't do anything more about it.

Q. You just took it in to Doctor Palmer, and that is all? A. Yes.

Q. That is the last you saw of it?

A. That is the last I saw of it.

Q. How often did Doctor Rex Palmer come to the hospital?

(Testimony of Jennie M. Babbitt.)

Mr. Savage: That is a question that is difficult to answer.

Q. Just approximately? Would you say he came every day that Doctor Don Palmer came?

A. Yes, he and Doctor Don Palmer saw him every day.

Q. And they operated on Mr. Babbitt?

A. Well, they—what they told me that his son assisted him. [144]

Q. Well, did you see the son during or about the time of the operations?

A. Well, when he was brought down from it I saw him that day, after the operation.

Q. And did you discuss Mr. Babbitt's condition with him?

A. Well, they didn't always come together, whichever one was there, and I could get ahold of, I would talk to him.

Q. Did Doctor Rex Palmer ever come there by himself?

A. He may have, I don't know.

Q. Did you ever talk to him alone about this matter?

A. Yes. He explained to me the meaning of a fat embolus. He said it was like the sap of a tree, and that it flow in the blood stream until it hit a vital part—

Mr. Savage: A little louder, I didn't hear the last part of that answer.

A. Doctor Rex Palmer explained to me the meaning of a fat embolus, and he said that it was

(Testimony of Jennie M. Babbitt.)

like the sap of a tree; that it would be flowing in the blood stream until it hit a vital part.

Q. And when did that conversation take place?

A. Well, it was before Saturday morning, when it hit him.

Q. You say it was before the Saturday morning when he became unconscious?

A. Well, no, it couldn't have been, because we did not know [145] this had occurred until after that Saturday morning.

Q. As a matter of fact, weren't you just about to take Mr. Babbitt home on that Saturday morning?

A. Yes, he was doing so well that I had made all arrangements to take him home.

Q. And who had advised you that you could take him home?

Mr. Savage: Just a moment, that is assuming that somebody did.

Q. Did anybody advise you that you could take him home? A. Yes, sir.

Q. Who advised you?

A. Doctor Don Palmer.

Q. Did Doctor Rex Palmer have anything to do with that?

A. I don't know, Don Palmer was my physician at all times.

Q. Were you making preparations to take Mr. Babbitt home?

A. Yes, I had secured a hospital bed, and had

(Testimony of Jennie M. Babbitt.)

secured the visiting nurse service, and we were going to take him home Saturday morning.

Q. And that was on the advice of Doctor Don Palmer, you say? A. Yes.

Q. Now, did you have any other conversations with Doctor Rex Palmer?

A. Well, I may have. I don't recall any particular conversations. [146]

Q. Now, was he able to stand readily without any support when he was not walking? Did he have to have anything to support him?

A. Yes, he could stand without walking, there is no question about that.

Q. Did he have any difficulty with his vision or his eyesight? A. He never wore glasses.

Q. He never wore glasses. Did he read books or magazines without the use of glasses?

A. He, he read all the time. It was his chief pleasure.

Q. You say he got out of bed alone?

A. Yes, sir.

Q. You did not assist him in any way?

A. No.

Q. And after he got out of bed he sat in the rocking chair? A. Yes.

Q. After he had put on a part of his union suit while seated in the rocking chair, he stood up?

A. Yes, sir.

Q. And he was standing?

A. He was standing.

Q. At the time he fell? A. Yes. [152]

(Testimony of Jennie M. Babbitt.)

Q. After he retired from the Railway Mail Service—that is, from active duty as a Postal clerk—railway mail clerk, was there any change or lowering in the amount of dues and assessments which he paid to the Railway Mail Association?

A. None whatever. [154]

Q. Directing your attention to what has been marked Plaintiff's Exhibit 5 for identification, Mrs. Babbitt, can you tell us what that is?

A. This is a picture of my husband, taken approximately ten years ago.

Mr. Jarvis: Your Honor, I don't know as this picture is relevant. I object to it on that ground.

The Court: It is relevant unless it is taken too remote in time. She says it was taken——

Q. Was it taken after he retired from the Railway Mail Service?

A. Yes, about four years afterwards.

Mr. Savage: I offer it then. I think it is material with respect to his condition.

Mr. Jarvis: It is 1932, Your Honor.

Mr. Savage: After counsel contended he had been diagnosed suffering from a defect which, under the terms of their answer, contributed to his death, and I think that his appearance as indicated by this picture is material.

The Court: The objection will be overruled. It may be admitted in evidence.

Mr. Jarvis: Exception, Your Honor. [156]

GUERNSEY K. CHAPLIN,

produced as an adverse witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Savage: [184]

Q. Did you see a small scatter rug alongside of the—of one of the beds there? [189]

A. Yes, sir.

Q. Did you see the rocking chair there, either on or beside the scatter rug? A. Yes, sir.

Q. Now, was it any part of your duty as a president of the local branch of the Railway Mail Association to make a report of your investigation?

A. Yes, sir.

Q. Did you make such a report? A. Yes.

Q. And to whom was that report sent?

A. Mr. John J. Kennedy, the national secretary, at Portsmouth, New Hampshire.

Q. Did you keep a copy of that report?

A. I think I did, yes, sir.

Q. Well, now, you say you think you did. Don't you know?

A. Well, I did. I have to assume that I did because I keep copies of everything.

Q. Now, without assuming, did you keep a copy of the report? A. Yes, sir.

Q. Do you have a copy of that report with you?

A. No, sir.

Q. Where is that copy?

(Testimony of Guernsey K. Chaplin.)

A. I think it is in the files. [190]

Q. You do? A. Yes, sir.

Q. Is that the report which you made to Mr. Kennedy after your investigation into the circumstances of this accident? A. Yes.

Mr. Savage: Offer it in evidence, Your Honor.

Q. That is your signature appended to it, is it?

A. Yes, sir.

Q. Is that an original or a copy, do you know?

A. It is a copy.

Q. A copy? A. No, this is the original.

Q. Are you sure, now, Mr. Chaplin? I don't suppose it makes much difference.

A. My copies are on yellow paper.

Q. Your copies are on yellow paper?

Mr. Jarvis: I have no objection.

The Court: It will be admitted in evidence.

(Whereupon letter dated July 22, 1943, to Mr. Kennedy from G. K. Chaplin referred to, was received in evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Savage: Ask permission to read it to the jury at the present time.

The Court: Yes. [195]

A. I also furnished her with a form of an affidavit, as to her identity.

Q. Her relationship to Fred I. Babbitt?

A. Yes, sir.

Q. And did you take her to some notary—before some notary to have it notarized? A. Yes, sir.

(Testimony of Guernsey K. Chaplin.)

Q. And was that forwarded to the defendant associations home offices? A. Yes, sir.

Q. And now, did you send to them any other documents, referring specifically to a certified copy of the death certificate? A. Yes, I did.

Q. You recall of it, you did? A. Yes, sir.

Q. Do you recall any other documents or records which you sent to Mr. Kennedy, the secretary of the National Organization, in connection with this case?

A. It is my belief that I sent him a card or statement.

Q. A coroner's statement, answer that is a——

A. Furnished me by the undertaker. That is the way I recall it.

Q. That is your recollection, now, that you furnished him [204] with a certified copy by the coroner's statement, is that right? A. Yes.

Q. Anything else that you can recall?

A. Well,——

Q. I will put the question this way, did you assist Mrs. Babbitt in the preparations of her claim for death benefits under this certificate which was presented to the committee on claims? A. No.

Q. Do you know whether such a claim was presented to the committee on claims?

A. Yes, sir.

Q. That is the regular and usual course of procedure, under your constitution and by-laws?

A. Yes, sir.

Q. And was that rejected? A. Yes.

(Testimony of Guernsey K. Chaplin.)

Q. Denied, and do you know whether after that, within the time limits prescribed, she appealed to the executive committee?

A. She appealed to the executive committee.

Q. You know that? A. Yes.

Q. And was her appeal allowed or was her claim still denied [205] or rejected?

A. It was rejected.

Q. And do you know that she received a notification to that effect from Mr. Kennedy, of the home office? A. I have a copy.

Q. You have a copy?

A. I have seen a copy of the notification, yes.

Q. Do you know whether there was any reduction in the amount of dues or assessments paid by Mr. Babbitt to the Railway Mail Association after he retired from active duty?

A. I don't know about the record in Mr. Babbitt's case. I have no access to them, as to his payments into the Association.

Q. Well, I'll ask you if it is not a fact that the payments made by Mr. Babbitt, or on his behalf, were the same after his retirement from active service as they were before?

A. I would have to have the records to know that. I can't state it.

Q. Well, you are familiar with the constitution and by-laws, are you not?

A. Yes, but I don't know what option he took.

Q. Well, is there any provision in the constitu-

(Testimony of Guernsey K. Chaplin.)

tion and by-laws for the reduction of dues and assessments in a [206] case of that kind?

A. Not for full membership.

Q. Well, he was a full member, was he not?

A. Yes, I think he was. [207]

DR. DON H. PALMER,

recalled as a witness on behalf of the Plaintiff, was examined and testified further as follows:

Cross-Examination—(Resumed)

By Mr. Jarvis:

Q. Doctor Palmer, can you hear me now?

A. Can I what?

Q. Can you hear me now?

A. I can when you talk that way.

Q. Doctor, your office is in the Medical Arts Building in Seattle, is that right?

A. Yes, sir.

Q. And Doctor, Rex Palmer's office, was that there also? A. Yes, sir.

Q. Are you and Doctor Rex Palmer associated in the—were you associated in the practice of medicine? A. Yes, sir.

Q. Were both of you associated on this case?

A. Yes, sir.

Q. And I believe you testified you agreed with Doctor Rex Palmer's diagnosis of the case?

A. A fractured hip, yes, sir.

Q. And the treatment the patient was given?

A. Yes. [212]

(Testimony of Dr. Don H. Palmer.)

A. (Continuing): He says, "This is the body of a fairly well developed and well nourished white male." Now, Mr. Babbitt never was a well man at any time. He was a moderately developed man as far as his size is concerned. Now that is an individual opinion that he has given.

Now he makes an anatomical diagnosis. I don't know how long after death this was made. I don't know whether this body had been embalmed before the examination was made. I knew nothing about the autopsy until after this trial started. Now he says in his anatomical diagnosis in his findings: One, fracture of the left femur. Two, hemorrhage like infarct in both lungs, extensive infarction of the pons, overlying the ventricles with area of necrosis and slight hemorrhage, generally marked arterial sclerosis, marked edema of the brain, marked arterio chronic nephritis.

Now, we will take those up one at a time. The fracture of the left femur means the fracture of the left hip bone?

A. That means the left femur—that is the thigh bones.

Q. Marked infarction of both lungs. What does that mean?

A. That means just exactly that, an infarction of the lungs. I described it to you yesterday as being like a shingle bolt in a river. If you would imagine that river running in a reverse direction to a normal river. The bolt was in [218] the mouth of the river. It goes upstream until the stream di-

(Testimony of Dr. Don H. Palmer.)

vides. The bolt goes into one of the two main trunks—perhaps goes over to the left side, goes through that until it subdivides, again goes into one side or the other. It finally goes up to the tributaries where it can't go through either branch, and it blocks both of them.

Q. Well, now——

A. (Continuing): Now everything beyond that point where the blood vessel is blocked, is dead, so to speak. It does not get its normal nourishment.

Q. And that is called a necrosis area?

A. What is that?

Q. That is called a necrosis area? A. Yes.

Q. Now, the autopsy does not show, does it, Doctor, that there was an embolus in either of the lungs or the brain?

A. It said there was marked infarction.

Q. That is not an embolus, is it?

A. No, but it is caused by an embolus.

Q. Is it necessarily caused by an embolus?

A. Yes, sir. That is what I tried to explain to you yesterday.

Q. Could it be caused by a breaking of a blood vessel?

A. No, it is caused by a blocking of a blood vessel. [219]

Q. Do blood vessels ever break without being blocked? A. Oh yes.

Q. As a matter of fact, in the more or less advanced stages of arterial sclerosis, are blood vessels more or less prone to break?

(Testimony of Dr. Don H. Palmer.)

A. Yes. That sclerosis means hardening. Things that are hard break.

Q. In ordinary language, what is the meaning of arteriosclerosis?

A. Hardening of the arteries.

Q. What is the meaning of arteriosclerosis?

A. The hardening of the arteries. The same thing.

Q. Now you notice that autopsy report shows there was an extensive—what?

A. Infarction.

Q. Infarction of both lungs. It does not say that there was any embolus found in either one of the lungs, does it?

A. No, but anybody that understands pathology know that was preceded by an embolus.

Q. Could it necessarily have been preceded by an embolus? A. Absolutely was.

Q. I am not asking you what it was. I am asking you what the possibilities and probabilities are.

A. I say as a fact it was. [220]

Redirect Examination

By Mr. Savage:

Q. Doctor Palmer, after reading the autopsy report of Fred I. Babbitt, signed by Doctor Alfred L. Balle, which is defendant's Exhibit A-1, have you changed your opinion as to the cause of death of Fred I. Babbitt? A. Not one particle.

Q. Is it still your opinion that his death was due to a fat embolus, caused by a fractured femur?

A. Combination of a fracture of his femur, yes.

(Testimony of Dr. Don H. Palmer.)

Q. Could the fracture of the femur be caused by an accidental fall, in your opinion?

A. It is a very common cause of a fracture of the head and neck of the femur. [236]

Q. Is that especially true in persons of the age of Fred I. Babbitt? A. Yes, sir.

Q. Doctor, was the arterio-sclerotic condition which is indicated by this report—by the autopsy report which is your exhibit A-1, natural or normal for a man of the age of 70 years?

A. I would say it is normal.

Q. Referring again to the defendant's exhibit A-1, at the bottom of the page to this language, Doctor, "Anatomic Diagnosis, Fracture of left femur; 2, Hemorrhagic infarct of both lungs", in your opinion was that hemorrhagic infarct to both lungs due to a fat embolus?

A. Yes, from a fractured femur.

Q. Reading further, "Extensive infarction of the pons overlying the ventricles with areas of necrosis and slight hemorrhage". In your opinion was the extensive infarction of the pons due to an embolus which came from a fractured femur?

A. The embolus came secondarily from the lung. It came from the femur to the lung first, and then after that area in the lung becomes degenerated and soft, then it gets into the blood stream from the lung and goes to the brain, and that was the final cause of his death.

Mr. Savage: That is all, Your Honor. [237]

DR. CONRAD JACOBSON,

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Savage:

Q. Doctor, will you give us your full name?

A. Well, my name is Doctor Conrad Jacobson.

Q. Where do you live?

A. In the city of Seattle.

Q. And are you licensed to practice medicine in the state of Washington? A. I am.

Q. And for how long have you been so licensed?

A. I have been here since 1921 and '22, I think. I practiced nothing else but surgery, and most of my work being neurological surgery.

Q. When you say most of your work is neurological surgery, what kind of surgery—

A. That means surgery of the brain, spinal cord and nerves.

Q. Where did you receive your training Doctor?

A. Well, I graduated from Hopkins—in 1911—John Hopkins. I stayed there a year, and had charge of surgical research for a year. From there I went up to Boston and lived in the Brigham Hospital. That is the teaching college, and [241] taught surgery there for almost ten years. From there I went to teach at the University of Minnesota full time, and have been in private practice and surgery, and general neurological surgery in Seattle since about 1922 or 1921, I have forgotten.

(Testimony of Dr. Conrad Jacobson.)

Q. Doctor, during the course of your training and experience, were you ever associated with Doctor Harvey Cushing?

A. I was with him for ten years.

Q. And who was Doctor Harvey Cushing?

A. Well, Doctor Harvey Cushing was one of the pioneers in brain surgery.

Q. And you were with him for a period of ten years?

A. Pretty close to ten years, but I devoted myself to both general and neurological surgery.

Q. Are you a member of any of the boards of any of the Seattle hospitals?

A. Yes, sir, I am on the staff of the Seattle General Hospital, and on the staff of the Orthopedic Hospital. I am consultant at the Marine Hospital—consultant in surgery, and also on the staff of the King County Hospital.

Q. Are you a member of the King County Medical Society? A. I am, yes.

Q. Have you ever been an officer of that organization? A. Not of the King County.

Q. Have you been an officer of a medical society? [242]

A. Yes, president of the Seattle Surgical Society.

Q. Doctor, did you ever know Fred I. Babbitt?

A. I never saw him. I am only familiar with his history, and my conversation with Doctor Palmer.

(Testimony of Dr. Conrad Jacobson.)

Q. Have you examined the hospital records in the Seattle General Hospital?

A. I have examined the hospital records, yes.

Q. And during the time you were in the court room, I will ask you, Doctor, if you did not read and examine the Defendant's Exhibit A-1, which is an autopsy report of Fred I. Babbitt by Alfred L. Balle, pathologist?

A. I saw part of it, and I heard some of it discussed here in the court room.

Q. Doctor, reading to you from the anatomic diagnosis of Defendant's Exhibit A-1, item 1, fracture of left femur; 2, hemorrhagic infarct of both lungs, extensive infarction of the pons overlying the ventricles with area of necrosis and slight hemorrhage.

Tell, us, Doctor, whether you as an expert are able to form an opinion as to the cause of Fred I. Babbitt's death?

Mr. Jarvis: Your Honor, I object to that question as incompetent, irrelevant and immaterial, and as not covering the issues or the facts as developed in this case, and because it is based, or attempted to be [243] based on some record that is not produced nor in evidence in this case.

The Court: I understand the question is based not only on the reading there, but upon the doctor's examination of the hospital records, indicating when the patient came in——

Mr. Savage: Yes, and the reading of the Defendant's own exhibit, Your Honor.

(Testimony of Dr. Conrad Jacobson.)

The Court: Independent of any previous history perhaps, would not be a sufficient hypothesis to base an opinion, but if he is familiar——

Q. Basing your opinion upon the hospital records you have examined and the reading I have made just now——

Mr. Jarvis: May I have a further objection that the hospital records are not in this case at all.

Mr. Savage: They have not been admitted, but the doctor testifies that he did read them at the Seattle General Hospital.

Mr. Jarvis: That, Your Honor, is injecting an element into this case that is entirely outside of it right now.

The Court: I think perhaps you better frame your question a little broader, taking the history of this case from the date of the accident and as you contend the nature of the accident. [244]

Mr. Savage: First of all, Your Honor, please, I offer in evidence Plaintiff's Exhibit 4 for identification, which are the x-rays and hospital records of the Seattle General Hospital relating to the case of Fred I. Babbitt from July 9 up to and including the day of his death.

The Court: Any objection?

Mr. Jarvis: They have not been sufficiently identified in this case and for that reason I do not object to them.

The Court: The x-rays have been sufficiently identified. I do not think the hospital records were.

Mr. Savage: I think the hospital records were

(Testimony of Dr. Conrad Jacobson.)

identified as a part of the permanent records of the Seattle General Hospital by Mr. Fels, who is the custodian thereof, and kept in their usual and regular course of business, Your Honor.

The Court: I think that is correct, Mr. Jarvis. Objection will be overruled and exception allowed, and it will be admitted in evidence.

(Whereupon hospital records and X-rays referred to were received in evidence and marked Plaintiff's Exhibit No. 4).

Q. Now Doctor, taking into consideration the examination which you made of the hospital records at the Seattle [245] General Hospital of Fred I. Babbitt, of his disability from July 9 to July 30, inclusive, the day that he died, and also taking into consideration this language from Defendant's Exhibit A-1:

"Anatomic diagnosis: Fracture of left femur; hemorrhagic infarct of both lungs; extensive infarction of the pons overlying the ventricles with areas of necrosis and slight hemorrhage". Tell us, Doctor, whether you are able to form an opinion as to the cause of Fred I. Babbitt's death.

Mr. Jarvis: Just a minute, Your Honor, I object to that question.

The Court: Well, he may answer the question first "yes" or "no".

A. Yes, sir, I think I can.

Mr. Savage: Just answer "yes" or "no."

Q. What is your opinion, Doctor? Just a moment, don't answer.

(Testimony of Dr. Conrad Jacobson.)

Mr. Jarvis: Now may I make the objection that the question does not cover the evidence nor the record in this case, nor does it cover the elements that have been introduced in evidence relating to either the disease or the death of Mr. Babbitt?

The Court: Well of course I do not know what there is in the hospital records, if they show anything about the disease. It is admitted by all parties—it is [246] not in dispute he was afflicted for a period of years.

Mr. Savage: I will add the further element for the Doctor's consideration, assuming also that Fred I. Babbitt was afflicted with multiple sclerosis at the time and had been since 1926 or 1927, Doctor Jacobson?

Mr. Jarvis: I make the same objection, Your Honor.

The Court: Objection will be overruled, exception allowed.

Q. Doctor, in your opinion what was the cause of Fred I. Babbitt's death? A. He died——

Mr. Jarvis: Could my objection go to all this?

The Court: Oh it does, certainly.

Mr. Jarvis: Without repeating it.

A. (Continuing) In my opinion he died from an infarction of the lungs and infarction of the pons, as a complication to a fractured femur, directly due to the fractured femur.

Q. Well, Doctor, in your opinion as a medical expert, can or may a fractured femur result from a fall?

(Testimony of Dr. Conrad Jacobson.)

A. A fractured femur may result from a fall. That is the common cause of a fractured femur.

Q. Doctor, in your opinion, would Fred I. Babbitt, considering now his history and the case records, die from the fractured femur and infarction, even if he had not been [217] afflicted with multiple sclerosis? Now don't answer until counsel has an opportunity to object.

Mr. Jarvis: Your Honor, this witness did not see Mr. Babbitt during his lifetime at all. The question is a hypothetical question. It is not based on the evidence in this case, and does not purport to contain all the elements that are before the Court and the jury in this case.

The Court: I think I shall sustain the objection to its form.

Q. Doctor, assume an individual of the age of 70 years; assume also that that individual is afflicted with multiple sclerosis and has been for fourteen or fifteen years. Assume further that that individual suffered a fall from which he sustained a fractured femur. Assume further, Doctor, that the fracture was reduced, the leg placed in a well splint, and for a period of time the man seemed to make satisfactory progress; assume that a week later he lapsed into a coma from which he never regained consciousness, and that he did approximately ten days later. Are you able to form an opinion, Doctor, as to whether the multiple sclerosis with which he had been afflicted, was a contributing cause of death?

(Testimony of Dr. Conrad Jacobson.)

Mr. Jarvis: Your Honor——

The Court: Answer “yes” or “No”. [248]

A. Yes, sir, I think I can.

Mr. Jarvis: Just a minute, Doctor. I make the same objection that the question does not cover, nor does it purport to cover all of the evidence, or the record in this case. I refer especially to Doctor Palmer’s testimony in cross examination.

Mr. Savage: I believe, Your Honor, the question fairly covers all the elements of the case, insofar as they have been introduced by the plaintiff, and also by the plaintiff’s witnesses.

The Court: Perhaps that question should be broad enough to include all the elements set forth, whether they are accepted or not, in this autopsy report.

Mr. Savage: I am willing to do that.

Q. (Continuing): Assume also, that the autopsy report showed the following facts, that the body was one of a fairly well developed and well nourished white male. Skin generally is clear and free from eruption. The chest is symmetrical, the abdomen is on level with the chest. There is a slight discoloration over the left foot and the left leg and foot is everted.

When the body is opened the peritoneum is smooth and glistening and the intestines are of uniform caliber. The liver is at the usual position and the stomach is not distended. The spleen lies free. The [219] kidneys are small and when examined the capsules strip with difficulty leaving a markedly

(Testimony of Dr. Conrad Jacobson.)

scarred contracted surface beneath. There is a marked diminution of the cortex of the kidney. When the chest is opened the lungs fail to meet in the midline. Both lungs lie free and the lower lobe of the left lung shows some areas of consolidation. The lower lobe of the right lung show a large hemorrhagic infarct. When the heart is opened it is found filled with fluid and clotted blood. There are no valvular changes. The coronary arteries are patent throughout. There as a marked sclerosis of the arch of the aorta with atheromatous plaques. The cut surface of the spleen show an intact capsule with an increase of the fibrous tissue.

When the calvarium is removed the dura stands high above the brain, due to fluid beneath. The pia-arachnoids show diffuse scarring with considerable fluid beneath. There is a diffuse whitish gray thickening of most of pia-arachnoid. When the brain is opened the ventricles are patent. The left ventricle appears slightly dilated in relation to the right. Sections of the cortex and the basal nuclei of the brain shows no abnormal changes. Sections of the brain stem and pons overlying the ventricles show an area of necrosis with a hemorrhagic coloring. This necrosis and coloring extends [250] for a distance of 1.5 cm and ends about at the medulla, this is most marked on the left half though it has crossed the midline in some areas of the pons. The arteries of the basal vessels are markedly thickened and show many areas of sclerosis. The cerebellum show no noteworthy changes. The base of the skull

(Testimony of Dr. Conrad Jacobson.)

is intact. There is no evidence of fracture in any portion of the skull. There is no evidence of gross hemorrhage.

Anatomic diagnosis: 1. Fracture of the left femur. 2. Hemorrhagic infarct of both lungs. Extensive infarction of the pans overlying the ventricles with areas of necrosis and slight hemorrhage. 3. Generalised marked arterial sclerosis. 4. Marked edema of the brain. 5. Marked arterio sclerotic nephritis.

Detor, assuming what I have read to you in addition to the history which I gave you, and the records of the Seattle General Hospital which have been admitted here in evidence, are you able to form an opinion as to whether Fred I. Babbitt would have died from a fracture of the left femur, even if he had not been afflicted with multiple sclerosis?

Mr. Jarvis: Your Honor, I make—oh, he can answer yes or no.

A. Yes, I think I can.

Q. And Doctor, what is that opinion? [251]

Mr. Jarvis: Your Honor, I make the same objection, that the question does not cover the records in this case as established, nor the evidence that is in, and I make the objection to the form of the question.

The Court: I think the question should perhaps be framed slightly different—not limited to multiple sclerosis, but multiple sclerosis and the other conditions that have been disclosed by the report that you just read, and the hospital records and I assume that was your intent to ask the question.

(Testimony of Dr. Conrad Jacobson.)

Mr. Savage: It was. May I modify it in the language that Your Honor has used?

Q. Now Doctor, are you able to form an opinion as to whether he would have died from the complications of a left—or a fracture of the left femur, even though he had not—even though he had not afflicted with multiple sclerosis, or complications which might arise, dependent thereon?

A. Yes, sir, I think I can.

Q. Now, Doctor, what is your opinion in that respect?

Mr. Larvis: I make the same objection.

The Court: Same ruling, and an exception allowed.

A. I think Mr. *Babbitt* from the direct complication of his injury, I believe that his multiple sclerosis had nothing [252] at all to do with his death.

Mr. Savage: Cross examine. [253]

Cross Examination

Q. Does it affect the entire body?

A. No, it depends on where it hits.

Q. Does it affect the entire nervous system?

A. No, that is why it is called multiple. It hits in different spots.

Q. Is it called multiple because of the large number of regions?

A. That is the reason.

Q. Where is the place where it hits most?

A. Mostly the spinal cord.

(Testimony of Dr. Conrad Jacobson.)

Q. And what part of the spinal cord?

A. Any part of the spinal cord.

Q. Does it affect the nerves of the spinal cord?

A. Well yes, of course it affects the nerves which come from the spinal cord.

Q. Is a person with multiple sclerosis a healthy person?

A. They may be just as healthy as you or I.

Q. Do you know of any cases——

A. They don't recover, but they don't die, in multiple sclerosis.

Q. How long could they live?

A. Anywhere from fifteen to twenty years, and live a normal life. [255]

Q. When multiple sclerosis does hit the pons, what is the result?

A. That part which is hit degenerates, and becomes scar tissue.

Q. And as that forms scar tissue, does it have any complicating effect?

A. Well sure, it involves the nerves which come from that part. If it hits the part, for instance, that the arm comes from, the arm is likely to become stiff and paralyzed.

Q. If it hits the nerves that the legs come from, what happens?

A. The leg may get stiff and they may not have good coordination of that leg.

Q. That is quite common in multiple sclerosis cases?

(Testimony of Dr. Conrad Jacobson.)

A. Quite common, but that is generally a slow process. That may take fifteen years.

Q. You say it may take fifteen years. If a man was retired for a permanent disability in 1928, would you say that the disease had reached what state——

Mr. Savage: Just a moment, Doctor.

A. I can't tell you.

Q. I will say in this case we are talking about, the subject you have never seen, but Mr. Fred I. Babbitt—and he was a railway mail clerk, as you probably have heard. A. Yes. [257]

Q. Well, this was in 1928, Doctor, and he died in 1943. He was permanently retired for permanent total disability in 1928, and he was unable to follow any gainful occupation from that time on.

Mr. Savage: Just a moment.

Q. (Continuing): The diagnosis at that time, according to the record in this case, was multiple sclerosis. His legs were affected.

A. That does not mean anything. You tell me how much the legs were affected. A man can have multiple sclerosis and not be able to talk, and do everything else all right.

Q. He walked with such difficulty that he was unable to perform his occupation or duties as a railway mail clerk.

A. Yes, if they tell me he couldn't walk, or wasn't able to, I would say he most probably was in an advanced stage of multiple sclerosis.

Q. Now as the multiple sclerosis advanced from

(Testimony of Dr. Conrad Jacobson.)

then until 1943—is it a progressive or regressive disease?

A. They get better, and they get worse. They get better and then worse, but the general trend is downward.

Q. And each time they get better, isn't the next setback worse than the previous condition?

A. That is what I say, the general trend is downward. [259]

Mr. Savage: Just a moment, Your Honor please. That is not cross examination, if he is going to put a [260] hypothetical question.

The Court: He can qualify the question by the history.

Mr. Jarvis: I do not intend to ask a hypothetical question.

Q. You gave an answer to a hypothetical question in this case. Now what I want to know is: Is it humanly possible, or is it possible, for Mr. Babbitt's death to have been caused by any other—for any other reasons than those that you stated?

A. Not as far as the history that I read of him, and so on. Here is a man who has a fractured femur. He dies. In my opinion he dies. He has an infaret of the lung. He has an infaret of the brain stem. That is caused by the fracture. He would have had that whether he had multiple sclerosis or not. A lot of people—anybody who has a fracture is likely to have that. The bigger the fracture the more chances there *are have*—

(Testimony of Dr. Conrad Jacobson.)

Q. Could he have had it if he had not had the fall?
A. Not from his multiple sclerosis.

Q. Could he have had it from arterial sclerosis?

A. I don't think so. It is all supposition.

Q. You get down to the supposition. That is what I want to get at. What supposition?

A. I am not making any supposition. I say, here is a man [261] who had a fractured femur. Following the fractured femur, as occurs quite commonly, he had an infarct of both lungs, and he had an infarct of the brain stem. These all show that they were recent. The autopsy shows they were recent. Therefore in my opinion, that man died from a complication following a fractured femur. They die the same—same complications, with or without a multiple sclerosis.

Q. Doctor, that is just your opinion?

A. I am giving you my opinion.

Q. But what I want to know is, could anything else have caused the death?

A. Perhaps you can tell me. I don't know.

Q. Well, Doctor, you are a doctor.

A. Well I say, perhaps somebody shot him, but I didn't see him.

Q. But could he have broken an artery?

A. A broken artery wouldn't give him that. There is no sign of a broken artery.

Q. Well, what is the hemorrhage from?

A. The hemorrhage of this case came from an infarct.

Q. What is an infarct?

(Testimony of Dr. Conrad Jacobson.)

A. An infarct is a clogged up artery. A blood clot gets in and plugs up the artery. Therefore the blood can't get out of that area, and you have a hemorrhagic area. The blood [262] can't come in. Therefore it dies, if you want to put it that way.

Q. Does the artery break?

A. No, the artery does not break. The artery is plugged up, just the same as a hose is plugged up, and won't allow the water to go through that hose.

Q. Well, now——

A. A hemorrhage and an embolus is two different things, entirely.

Q. What is a hemorrhagic infarct?

A. That is what I am trying to tell you, that is a hemorrhagic infarct. It is caused by a blood clot. The blood can't get out, can't you see? In the tissues we have arterial blood which comes in and the poor blood goes out. When you get an infarct, if the blood can't go out—if it can't come in, because it is the force of the blood that forces it out. Therefore that area which is not supplied with blood dies, and we call it an infarct, and infarcts are particularly dangerous in the brain because they have only one supply.

Q. Doctor, would the infarct in the pons cause death?

A. It may cause death. That depends entirely on the size of it.

Q. You say it may cause death?

A. Well sure, it may cause death. [263]

Q. What I want to know, is it possible for this

(Testimony of Dr. Conrad Jacobson.)

foreign matter to get into the blood stream from any other source than the broken hip?

A. In my opinion, no. If he had a stroke in the brain, or a hemorrhage any place else, it might possibly could have gotten in. Such a thing is possible, but that is all conjectural. I might shoot the man and get a blood clot from that, but here is a man who had a fractured femur, a large amount of blood in the tissues, fat coming from the bone marrow. You find the results of it in the lung, and you find the result of it in the brain.

Q. But what I am asking you is, do people die of hemorrhagic infarction when they haven't a broken bone, or a broken tissue?

A. No. I mean a blood clot has to come from something, and it usually comes when blood is spilt. The blood does not clot in your veins at all. We would all be dying if that is true. I can hit a person and bleed, or something like that, and then it might clot and then be carried away?

Q. Could it be formed by a lesion?

A. A lesion?

Q. Yes. [266]

A. Well, a lesion means some injury. A lesion means a disease. A blood clot is a lesion. Scarlet fever is a lesion. I can't answer that. [267]

Mr. Savage: We rest, Your Honor.

The Court: The jury now will be excused until 10:00 o'clock tomorrow morning, and you will report back here at that time.

(Whereupon the jurors retired from the court room.)

The Court: Now, Mr. Jarvis, I assume that you desire to make a motion.

Mr. Jarvis: Yes, Your Honor.

The Court: I would rather you do that now.

Mr. Jarvis: Your Honor, I would like to make a few motions, that according to the rules, that Your Honor make a direction to the jury to bring in a directed verdict, and that Your Honor decide the case at this time in favor of the defendant, because of the insufficiency of the plaintiff's evidence, and because the facts as established, have left both the cause of the accident, and also the cause of the death in such a state that the verdict of the jury can only be based on speculation and conjecture, and not on surmises which may be drawn from facts.

(Whereupon argument by counsel.) [290]

DR. ALFRED L. BALLE,

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows: [294]

Cross Examination

Q. Now you say you found a hemorrhagic infarct of both lungs? A. Yes, sir.

Q. And was that hemorrhagic infarct of both lungs extensive enough to cause death, Doctor?

A. Well, that varies.

(Testimony of Dr. Alfred L. Balle.)

Q. I am talking about this particular case, Doctor. A. I really don't know.

Q. You don't know? A. No.

Q. Well can you give us your best opinion as an expert? A. Yes, I can.

Q. What was that opinion?

A. My opinion is that the infarction was found in both lower lobes, and——

Q. Doctor, pardon, that was not the question I asked you. A. I will explain it to you.

Q. Go right ahead.

A. And that would leave considerable lung tissue not affected, and there would be a chance that the person could live with that condition.

Q. All right, now you still haven't answered my question. [325]

A. That is my opinion. I don't know whether it is.

Mr. Jarvis: He answered it.

Mr. Savage: We will let the Court pass on it rather than counsel for the defendant.

Q. Doctor, in your opinion. when you say hemorrhagic infarct of both lungs, in your opinion was that hemorrhagic infarct to both lungs extensive enough to cause death? A. In this case?

Q. Yes. A. No.

Q. Could it have caused death in this case?

A. Yes.

Q. It could have caused death? A. Yes.

Q. Now, Doctor, what is an infarct?

(Testimony of Dr. Alfred L. Balle.)

A. That is an area of tissue deprived of its blood supply.

Q. The infarct itself is the area of tissue deprived of the blood supply? A. That is right.

Q. And what causes an infarct?

A. An obstruction of the blood supply.

Q. Can an embolus cause an infarct or an obstruction of the blood supply? A. Yes.

Q. Assuming, Doctor, that there was an embolus in the blood [326] stream in this case, and that it came and lodged in the lungs, could it have caused this infarct? A. Yes, sir.

Q. Now you also say, Doctor, that there was an extensive infarction of the pons overlying the ventricles, with areas of necrosis and light hemorrhage.

A. Yes, sir.

Q. Was that extensive infarction of the pons sufficient to cause death? A. Yes, sir.

Q. And could that extensive infarction of the pons have been caused by an embolus?

A. Yes, sir.

Q. Now you say "slight hemorrhage." Doctor, is it or is it not a fact that the hemorrhage was slight because the blood supply was cut off by the embolus or thrombus?

A. Well, that could have been due to a small rupture of a vessel, that amount of hemorrhage.

Q. I see. Well, if there was no obstruction the hemorrhage would have been more extensive, isn't that right, Doctor?

(Testimony of Dr. Alfred L. Balle.)

A. Not necessarily. Ordinarily in that type of infarct there is no hemorrhage connected with it.

Q. Is there a discoloration? A. Yes.

Q. And what color is the discoloration? [327]

A. It becomes gray and mattery like. [328]

Q. Now, Doctor, did you in response to a question put by Mr. Jarvis say that the hemorrhagic infarct to both lungs was a physical defect?

A. Yes, sir.

Q. Doctor, but is that physical defect not caused by an obstruction? [330] A. Yes, sir.

Q. So what makes that defect is an obstruction, an embolus or a thrombus? A. Yes, sir.

Q. And Doctor, you also stated, I think, in response to a question put by Mr. Jarvis that the extensive infarction of the pons overlying the ventricles was a physical defect? A. Yes, sir.

Q. Now that physical defect has to be caused by something, does it not, Doctor?

A. That is right.

Q. And that physical defect was caused by an obstruction, was it not, Doctor?

A. Of his blood supply.

Q. Of the blood supply, and Doctor, in your opinion was that obstruction of the blood supply which resulted, and the physical defect, caused by an embolus or a thrombus?

A. I have no way of telling.

Q. Well it could have been caused by either a thrombus or an embolus? A. Yes, sir.

(Testimony of Dr. Alfred L. Balle.)

Q. Doctor, can you name or tell me some of the common causes of fat embolus?

A. Well, the fracture—— [331]

Q. Name or tell me some of the common causes of embolus? A. Well, any specific thing?

Q. Let's get to a fat embolus.

A. There is a fracture of a bone.

Q. A fracture of a bone? A. Yes, sir.

Q. Doctor, is it not true that a fracture of a bone is the most common cause of a fat embolus?

A. Yes, sir.

Q. It is? A. Yes.

Q. And Doctor, could the fracture of a bone result in a thrombus—am I stating that correctly?

A. No.

Q. By rupturing a blood vein it could not result in a thrombus? [332]

A. It could not in a thrombus. It could in an embolus.

Q. Doctor, is it or is it not true that a fat embolus may both go to the lungs and go to the brain? A. Yes, it can.

Q. Doctor, I will ask you if it is not true that when an embolus of sufficient size goes to the lungs or the brain, [336] or both, it will result in death by reason of an infaret, is that right?

A. Yes, sir. [337]

HERBERT J. MATTHEWS,

produced as a witness on behalf of the Defendant, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Jarvis:

The Witness: Assessment numbers are shown under the assessment number column, and the date on the next column, and the date the assessments were paid.

Mr. Savage: Is this the complete record of all the payments made by Mr. Fred I. Babbitt?

The Witness: No, sir.

Mr. Savage: This is only part of it?

The Witness: That is only part of it. That is from 1922, when we went on the card filing record.

Mr. Savage: The only objection I have is the record is not complete, and in that respect it may be misleading.

Mr. Jarvis: Your Honor, we are only concerned from the period July 31, 1928, to date, as brought out in the direct examination of the plaintiff in this case. It was said on that examination there was a great many assessments. I am not quoting the words, but my recollection of them, that they came at either great regularity, or it seemed every other time a payment was made there was an extra assessment.

Mr. Savage: If I may interrupt, if your Honor please, I withdraw my objection so we can proceed.

(Testimony of Herbert J. Matthews.)

The Court: It will be admitted in evidence.

(Whereupon, assessment record card referred to was received in evidence and marked Defendant's Exhibit No. A-4.) [358]

Q. Handing you Defendant's Exhibit A-4, Mr. Matthews, and ask you, can you tell the jury what extra assessments or special assessments, in addition to this \$18.00 a year, was paid by Mr. Babbitt since July 31, 1928?

A. It will take a second to count. I think it was thirteen, or eighteen. It will just take a second to count them up here. Sixteen assessments—extra assessments, of one dollar.

Q. During that period? A. Yes, sir.

Q. And how much were each one of the assessments? A. One dollar.

Q. One dollar, so that the total amount of the extra assessments during that period was \$18.00?

A. Yes, sir.

The Court: It actually would be sixteen.

Mr. Jarvis: That is all, Mr. Matthews.

Cross Examination

By Mr. Savage:

Q. Mr. Matthews, does that Exhibit A-4 contain a record of all the assessments for the dates on which you—for the dates which are noted on that card? A. Yes, sir.

Q. And you say that that is only a part of his record? [359]

A. Well, I haven't the record—I took over in

(Testimony of Herbert J. Matthews.)

1917. There is about five years that I have the records, but——

Q. You did not bring them?

A. On different forms.

Q. And you don't know what he paid by way of assessments prior to that time?

A. Well, he paid all the assessments.

Q. He paid all the assessments? A. Yes.

Q. Then he did pay all the dues and all the assessments and was a member in good standing?

A. Yes, sir.

Q. Now, were his dues or assessments reduced, or cut down by reason of the fact that he was no longer active in the Railway Mail Association.

A. No, sir.

Q. They remained the same?

A. Yes, sir.

Mr. Savage: I think that is all, your Honor.

Mr. Jarvis: That is all, Mr. Matthews, thank you.

(Witness excused.) [360]

Mr. Jarvis: I understand that the exceptions may be taken at the conclusion——

The Court: Yes, after all the instructions are given.

Now, members of the jury, it becomes the duty of the Court at this stage of the proceedings to charge you as to the law that applies to a case of this nature, and it becomes your sworn duty to accept the law as the Court states it to you, even though your views may not coincide with those as

the Court expresses them. If I am in error in outlining the law as it applies to this case, there is a provision made for correcting such errors, either by the Court itself subsequent to the trial or by an appeal to a higher court.

Your function is to decide what the facts are, and to apply the law to the evidence as you heard it here, and if you are in error on what the facts are, there is no provision made to set them aside. Therefore, it is a matter of grave importance in assuming and discharging your duties as jurors, that you consider carefully and cautiously the facts in the case, and when you have once arrived at what the facts are, then apply the law as [376] the Court states it to you in this charge.

Anything that counsel might have said to you in the course of argument concerning what the facts were is to be accepted by you if it corresponds with your own view as to what the facts are, and if it does not correspond with your views, then of course you do not need to accept it, because the purpose of argument by counsel is to explain the facts—state them as they recall them, and to draw from them such inferences as they think are proper from their point of view, but in the final analysis, you are always the judges of what the facts are. Anything that I may say to you in reference to the facts of this case, or anything that might seem to indicate to you what my views are as to the facts,—and, under the procedure in the Federal Court the Court can sum up the facts—even give his conclusions, though I do not intend to do that in this case, but

you do not have to accept my conclusions as the facts.

If you think that from what I say in these instructions indicate what my views may be, because the responsibility of finding the facts is yours, just as the responsibility of stating the law to you, is mine; just as the responsibility of counsel representing the respective litigants, is to present their side of the controversy. [377]

The plaintiff in this case—that is, the person suing, is Mrs. Jennie M. Babbitt, and the defendant in the case, the party against whom the suit is brought, is the Railway Mail Association, a corporation.

Now, the basis of this suit is on a contract, which is designated and is in evidence in this case and will be with you in your jury room, as a beneficiary department certificate and probably will be referred to as a policy, and the Court may make such reference to it here. This certificate was issued to Fred I. Babbitt during his lifetime, and at a time when he was the husband of Jennie M. Babbitt, and Jennie M. Babbitt was named in the certificate as the beneficiary, if liability to pay thereon, arose.

Mrs. Babbitt brings the action claiming that there is liability, and that there is due to her the full amount of the policy as set forth therein.

The defendant—that is, the Railway Mail Association, admits that there was such a certificate and that it was in full force and effect on July the 30, 1943, the date when Fred I. Babbitt died. It denies, however, that it is subject to any liability whatever

to the plaintiff by reason of this certificate, and it denies that on July 9, 1943, Fred I. Babbitt slipped on a rug in his home and fell, fracturing his hip, which fracture [378] later caused a fat embolus to his lungs and brain, from which he died. And then the defendant in its pleadings denies that death was the result of the injuries if any, that Fred I. Babbitt sustained, and it denies that there is four thousand dollars or any sum whatsoever due from it to Mrs. Babbitt, by reason of the existence of the policy.

And then the defendant alleges that by reason of the provisions contained in the certificate or policy between it and the plaintiff's deceased husband, it would not be liable, since the contract itself provides:

"Accidental death shall be construed to be either sudden violent death from external, violent and accidental means, resulting directly and independently and exclusively of any other cause,"

and then it provides:

"That for death occurring within a period of one year following an accident,"

and has the further provision that:

"There shall be no liability whatever when disease, defect or bodily infirmity is a contributing cause of death."

The defendant contends that the death of Fred I. Babbitt did not result wholly or at all from the injury claimed by the plaintiff, and then it asserts

that [379] such death was not the result of external, violent or accidental means resulting directly, independently and exclusively of any other cause, and that such death was not the sole result of accidental means. And then the defendant contends that death was caused by disease, and defects, and bodily infirmities of Fred I. Babbitt, which contributed to the cause of his death, or to his death.

Now from this outline that I have given you, you will note the issues of fact upon which you must pass, and in this connection you are instructed that the law places upon the plaintiff—that is, Mrs. Babbitt, the burden of establishing by a preponderance of the evidence the material allegations of her complaint before she would be entitled to a verdict, and concisely stated they are: one, that on or about July 9, 1943, her husband, Fred I. Babbitt, while the holder of a beneficiary certificate in the Railway Mail Association, suffered an accident by slipping and falling upon a rug, the fall being of such violence that it later resulted in his death on July 30, 1943. Two, that the accidental fall fractured his left hip. Three, that the fracture caused a fat embolus to his lungs and brain, which produced his death, and these things the plaintiff has the burden of proving before she is entitled to a verdict. [380]

Now, the defendant has the burden of proving by a fair preponderance of the evidence the affirmative matter that it asserts, which briefly stated, is that any injuries sustained, or accident suffered by Fred I. Babbitt, was not the result of accidental means alone, and that disease, defects and bodily infirmi-

ties was the cause of, or were contributing causes of the death of Fred I. Babbitt.

There are certain words and phrases and terms that are used in the law as they apply in this case that should be more fully defined to you. For that reason I am going to advise you as to the definitions to be applied to such expressions.

The term "preponderance of the evidence" means the greater weight of the evidence. It is not necessarily determined by the number of witnesses testifying on one side or the other, since you may be thoroughly convinced of the truth of a given allegation by the testimony of a less number of witnesses testifying on that given point, against a greater number testifying to the contrary. The "preponderance of the evidence" in a civil case means the excess of the weight of the evidence, or that amount of evidence which turns the scales, which before its introduction were evenly balanced.

The expression "visible external marks of injury [381] or violence, suffered by the body, as found in this contract of insurance, is to be construed in a broad sense, to be anything that is discernible, perceptible or evident upon observation.

In this case if you believe that Fred I. Babbitt became pale or faint, or unduly perspired or disclosed a malformation of his left hip following a fall—an accidental fall, then such conditions would be within the phrase that I have just quoted to you from the contract.

"Direct cause" means an act, or acts, which are the moving efficient cause in direct sequence, unin-

terrputed by any new cause—new efficient cause, which in this case produced the death complaint of, and which, without it, would not have happened.

Now, the term “contributing cause of death due to disease, defect, or bodily infirmity” as applied to this case, means a cause which directly contributed to the death, and without such contribution death would not have resulted to Fred I. Babbitt.

An “accident,” as that term is used here, is an event proceeding from an unknown cause or happening, without a design on the part of the person who is injured. It is an unforeseen event, casualty, or chance, so that when death results from an injury not designed, nor the [392] danger being known, it would be accidental.

The language in this certificate using the expression “external, violent and accidental means” indicates anything operating from without. The injury itself, resulting from the accident, might be either upon or within the body. The policy does not require the injury be upon the outside of the body.

The word “injury” as used in the policy includes any damage, hurt, strain or wound, or any other harmful effect on any portion of the body, whether internal or external.

Now, in order that you may more fully understand the issues here, and the facts that you must find before you can return a verdict upon the issues as made, and at the risk of repeating what has already been said to you, I shall further advise you that before the plaintiff would be entitled to a verdict you must find that the bodily injuries sustained

by Fred I. Babbitt were due to an accident which resulted in external and violent injuries, to which disease, defect or bodily infirmity did not directly contribute. In other words, to entitle the plaintiff to a verdict, she must establish that the injuries suffered by Fred I. Babbitt on July the 9th, 1943, were accidental, and that as a proximate result of such injuries he died. The fact that Fred I. Babbitt fell on July 9, 1943, does not of itself establish that such [383] fall alone was by accidental means, and in order that the plaintiff to recover herein, you must find that the fall was occasioned by accidental means, and that disease, defect, or bodily infirmity did not directly contribute thereto. If you find that Fred I. Babbitt sustained an accident and thereafter suffered death as a result thereof, but that he would either have not sustained the accident or would not have died, except that he was afflicted with some preexisting disease, defect or bodily infirmity which directly contributed to the accident or to his death, or to both, then, under such conditions, the plaintiff would not be entitled to recover herein, and your verdict would be for the defendant.

You are further instructed that the policy herein sued upon is not a life insurance policy, nor a health insurance policy. The risks it insures against, insofar as involved in this case, are loss sustained by death resulting directly from the effects or an accident that has been sustained, and unless the plaintiff has established that as a fact, she would not be entitled to recover.

If, after a consideration of all of the evidence

introduced herein, both that of the plaintiff and of the defendant, you are unable to find as a fact that Fred I. Babbitt sustained an accident which caused external violent injuries from which he died, and that such accident and the [384] resulting injuries sustained were the direct and proximate cause of his death, independent of any directly contributing cause due to disease, defect or bodily infirmity, then your verdict would be for the defendant.

You are further instructed that if you are convinced by a fair preponderance of the evidence that there was an accident which set in motion a chain of events which finally terminated in the death of Fred I. Babbitt, without the intervention of any force operating or working actively from a new and independent source, then the plaintiff would be entitled to a verdict. Another way to state the same matter is to say if you are satisfied from the evidence that Fred I. Babbitt accidentally slipped on a rug on the floor of his home, and after having slipped and fallen he sustained a fractured leg, which in turn directly caused an embolus, and as a result of which he died, and this was not directly contributed to by disease, or bodily infirmity, then the plaintiff would be entitled to a verdict.

If the injury that Fred I. Babbitt sustained resulted from an accident which was the efficient cause that set in motion the agencies that resulted in his death, without the intervention of any other independent cause, then it would be regarded as the sole and proximate cause of his death. The fact that the physical infirmity [385] of Fred I.

Babbitt, or physical infirmities might have existed, of itself would not relieve the defendant from liability, nor deprive the plaintiff of her right of recovery, unless such physical disability or disease contributed directly to his death when it did occur. In other words, if the fall caused Mr. Babbitt's death as a direct result of the accident, and even though he were physically in a weakened condition due to multiple sclerosis, or any other disease or bodily infirmity, such a fall still would be the proximate cause of his death, unless you find that such multiple sclerosis or bodily infirmity directly contributed to the injury sustained and thus produced death.

Every disease or bodily infirmity which may have some connection with the death of the insured is not a defense to an action on a policy of this kind. Before it may be considered as a defense, you must be satisfied by a preponderance of the evidence as offered by the defendant company, together with the evidence submitted by the plaintiff that such disease or bodily infirmity was of a character, type and kind as to—that that it did directly concur in the effects of the accident in producing death, and unless you find this to be a fact, the plaintiff would be entitled to a verdict. If you do find it to be a fact, then the defendant would be [386] entitled to a verdict.

The question for you to determine is, in addition to others that I have mentioned, was there an ambolus which directly and proximately was caused by an accidental fall, and was not produced or con-

tributed to by reason of multiple sclerosis, or other bodily defect, from which the deceased might have been suffering, and did it produce death? If you find this to be a fact, then the plaintiff would be entitled to a verdict.

Now in this case a substantial bit of the oral evidence that has been offered is that of what we call "expert witnesses." When a person is called as an expert witness in a particular field of knowledge or learning, and allowed to express an opinion. These opinions are for the aid and assistance of the jury. They are not for the purpose of invading the functions of the jury. Testimony of an expert witness, insofar as it is based upon observation of particular conditions, is to be considered by you as that of any other witness, but his testimony concerning the facts in the case, if in the form of his opinion, when the facts are gathered from some other source as in the case at bar here, we have the facts gathered either from—not "either," but combined with hospital records, with oral testimony, and in part with personal observation on the part of at least one of the [387] experts—that is Doctor Don Palmer, the jury is not bound to find according to expert testimony, but it should be considered by you in connection with other evidence in the case. The duty to decide rests upon you, and it is your duty to evaluate and appraise the testimony of a witness who expresses opinions precisely as you would evaluate and appraise the testimony of witnesses who testify to facts within their personal knowledge. It is for you, in the light of all the circum-

stances disclosed during the progress of the trial, to place that weight upon, and give that credit to the testimony of each witness which you conscientiously believe, in the exercise of sound judgment and good sense it is fairly entitled to receive at your hands. An expert witness can only base an opinion on facts and records introduced in evidence, and any opinion which directly or indirectly is based upon facts or records not in evidence in the case, is not to be regarded by you.

You are the sole judges of the facts in the case, and also of the credibility of the witnesses, and of the weight and value you would give to each of them. In determining as to the credit that you should give to a witness, and the weight and value you should attach to his or her testimony, you may take into consideration the conduct and appearance of the witness on the stand, the [388] interest of the witness, if any, in the result of the trial, the motive actuating the witness in testifying; the witness' relation to, or feeling for or against the plaintiff or defendant, as the case may be, the probability or improbability of the witness' statements; the opportunity the witness had to observe or to be informed on matters respecting which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise, as to matters within the knowledge of such witness. All of these matters being taken into account with all the other facts and circumstances in evidence, it is your province to give to the testimony of each witness such weight and value as you deem proper. [389]

The Court: Your exception will be allowed.

Mr. Jarvis: Thank you, sir.

The Court: Now your number two is labelled number eight. That is refused, I think, unqualifiedly.

Mr. Jarvis: That Your Honor, of course, is the question that we have debated back and forth, and I do except to the refusal of the Court to give that on the grounds that have been stated in our argument before.

The Court: Now number nine. I refused to give the first part of it. I gave the last.

Mr. Jarvis: Number nine was my number——

The Court: Well, it is number nine here, too, because we just dealt with number eight.

Mr. Jarvis: That I except to, Your Honor, on Your Honor's refusal to give that instruction, on the grounds that I have stated in regard to the others.

The Court: Yes. Now are there any exceptions to the instructions given?

Mr. Jarvis: Your Honor, I do except to the instruction that Your Honor gave in regard to the burden of proof, in the first part of Your Honor's instructions to the jury. You stated that the burden is then on the [405] defendant of proving the affirmative matter that it asserts.

The Court: Yes.

Mr. Jarvis: I take an exception to that.

I also except, Your Honor, after stating about approximate cause, you then said that the burden was on the defendant to prove that either defect, disease,

or bodily infirmity was a contributing cause, if it did not directly cause the death. In substance, those words were used.

The Court: Yes.

Mr. Jarvis: I take an exception to that, Your Honor.

I also take an exception to the fact that Your Honor a little later on stated that Mr. Babbitt fell, or the jury could find that he fell, and that it was upon the defendant,—the burden of proof was on the defendant to prove that defect, disease or bodily infirmity contributed thereto. That was as distinct as from the cause of death. Your Honor made the distinction between the cause of the fall and the cause of death, and in both of those instructions, Your Honor placed the burden of proof to prove the defect, disease or bodily infirmity was the cause or contributing cause of the fall or the cause or contributing cause to the death.

The Court: But you are not excepting to the [406] fact that the Court recognized the contention that I understood you to be making, as I determined the policy to be that the bodily infirmity or disease caused the fall or contributed directly to the fall?

Mr. Jarvis: I am not excepting to that by any manner of means, Your Honor. A little later on Your Honor stated to the jury that if they find that the fall caused the embolus, and he died from the embolus, then the plaintiff is entitled to recover, unless the defendant proves that the defect, disease or bodily infirmity was the cause of death, and I except to that charge.

I further except to the charge that Your Honor gave that the defendant must prove by a preponderance of the evidence that the disease concurred either to cause the accident or death. That statement was made in the latter part of Your Honor's instructions. I can't quote it verbatim, but it was made in substance to that effect.

The Court: I think I recall it.

Mr. Jarvis: And I further except to the charge in regard to the embolus producing the death. I don't remember Your Honor's exact words in regard to that, but there was something about the burden being upon the plaintiff, I believe, to prove the embolus and then if they did prove it, then it was on us to prove it did not cause [407] the death.

The Court: Probably this is what you have in mind, another way to state the same, that Fred I. Babbitt slipped on a rug on the floor of his home, and after having slipped and fallen he sustained a fractured leg, which in turn directly caused an embolus,—

Mr. Jarvis: Yes.

The Court: —as a result of which he died, and this was not directly contributed to by disease or bodily infirmity, then the plaintiff would be entitled to a verdict herein.

Mr. Jarvis: Yes, I except to that, Your Honor, for the same reason that it is my opinion that the burden of proof in this particular case is upon the plaintiff to prove that they came within the terms of the policy.

Your Honor, I believe, gave in substance my re-

requested instruction in regard to the testimony of the experts. I do not believe——

The Court: I gave the last paragraph of it. I did not give the first of it. I gave that part only, "You are further instructed that an expert——"

Mr. Jarvis: That is your number?

The Court: It is number nine, both your request and——

Mr. Jarvis: Yes, I think I excepted to the refusal [408] of the Court to give the first part of it.

The Court: All exceptions, by both the plaintiff and defendant will be noted and allowed, and the jury that were sent out to deliberate, were sent out upon the Court's possibility of finding that there were such exceptions that the Court felt justified in further instructing them, and not having found any they will continue in the course of their deliberations.

(End of case.)

CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,

Official Court Reporter.

[Endorsed]: Filed March 25, 1946.

[Endorsed]: No. 11311. United States District Court of Appeals for the Ninth Circuit. Railway Mail Association, a corporation, Appellant, vs. Jennie M. Babbitt, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed April 29, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11311

JENNIE M. BABBITT,

Appellee,

vs.

RAILWAY MAIL ASSOCIATION,

Appellant.

STATEMENT OF POINTS UPON WHICH
APPELLANT RELIES

Appellant, Railway Mail Association, rely in this appeal upon the following points, to-wit:

1. To recover under the insurance contract in-

volved in this action, the plaintiff beneficiary must prove:

- (a) The existence of an insurance policy.
- (b) That the insured was a member in good standing at the time of his death by accident, of the Railway Mail Association.
- (c) The insured sustained an accident, which resulted in death.
- (d) Death resulted wholly from the accident.
- (e) The insured was suffering from no disease which contributed to his death.

2. This case should have been tried by the court and not by jury.

3. That there was not sufficient evidence to justify the submission of this cause to the jury at the conclusion of the plaintiff's testimony or at the conclusion of all of the testimony, and by reason thereof this case should have been dismissed by the Court, or the jury should have been directed to bring in a verdict for the defendant.

4. There was prejudicial admission of evidence in the trial of this case and prejudicial admission of medical testimony and conclusions to which proper objections were made, and if said objections had been sustained there was not sufficient evidence to submit to the jury, or if submitted the jury should have been instructed by the Court to bring in a verdict for the defendant.

5. The irregularity in the proceedings of the Court, jury or adverse party; orders of Court and

abuse of discretion by which the defendant was prevented from having a fair trial.

6. That there was no evidence or reasonable inference from the evidence to justify the verdict or the decision and that it is contrary to law.

7. The failure to permit defendant's Exhibits 5 and 6 for identification, being copies of plaintiff's original complaint and reply on file herein to be introduced in evidence.

8. The failure of the Court to dismiss this action at the conclusion of plaintiff's testimony.

9. The failure of the Court to direct the jury to bring in a verdict for the defendant at the conclusion of plaintiff's testimony.

10. The giving of the instructions to the jury accepted to by the defendant.

Dated at Seattle, Washington, April 29, 1946.

CATLETT, HARTMAN, JARVIS
& WILLIAMS,

/s/ JAMES G. MULROY,

Attorneys for Appellant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 30, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND ORDER ELIMINATING
ORIGINAL EXHIBITS

It is hereby stipulated and agreed by and between Railway Mail Association, Appellant, and Jennie M. Babbitt, Appellee, by their respective counsel, that all exhibits admitted in evidence at the trial of the above entitled case, and later upon appeal transmitted to the above entitled court as parts of the record herein, be excluded from printing, and that the Court be, and it is hereby, requested to consider the same in their original forms.

Dated at Seattle, Washington, May 9, 1946.

CATLETT, HARTMAN, JARVIS &
WILLIAMS, and

JAMES G. MULROY,

/s/ JAMES G. MULROY,
Attorneys for Appellant.

ALFRED LUNDIN and ANTHONY
SAVAGE,

/s/ ALFRED LUNDIN and ANTHONY
SAVAGE.

So Ordered:

/s/ CLIFTON MATHEWS,
Senior United States Circuit Judge.

[Endorsed]: Filed May 13, 1946. Paul P. O'Brien,
Clerk.

No. 11311

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAILWAY MAIL ASSOCIATION, a corporation,
Appellant,

vs.

JENNIE M. BABBITT, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

CATLETT, HARTMAN, JARVIS & WILLIAMS,
and

JAMES G. MULROY,

Attorneys for Appellant.

1410 Hoge Building,
Seattle 4, Washington.

FILED

AUG 23 1946

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAILWAY MAIL ASSOCIATION, a corpora- tion,	vs.	<i>Appellant,</i> <i>Appellee.</i>
		No. 11311

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

**STATEMENT OF PLEADINGS AND FACTS DISCLOS-
ING JURISDICTION OF THE DISTRICT COURT
AND THIS COURT**

Jennie M. Babbitt, as plaintiff, filed in the Superior Court of the State of Washington for King County, a complaint against Railway Mail Association (Tr. 2). Alleging diversity of citizenship and that the amount involved was more than \$3000, the defendant, Railway Mail Association filed in the Superior Court of the State of Washington for King County, its petition for removal, and pursuant to such petition the cause was removed to the United States District Court for the Western District of Washington, Northern Division (Tr. 6, Tr. 9). The juris-

diction of the District Court was based on 28 U.S.C.A. 71 and 72. The cause was tried before a jury which returned a verdict in favor of the plaintiff and judgment was entered in favor of the plaintiff and against the defendant pursuant to said verdict. Appeal was taken to this Court which has jurisdiction upon appeal to review such judgment. 28 U.S.C.A. 255.

STATEMENT OF CASE

Railway Mail Association was at all pertinent times and is now, a fraternal beneficiary association, conducted for the sole benefit of its members and beneficiaries and not for profit. It was organized and is existing for the purpose of providing closer social relationship among railway postal clerks, to enable them to perfect any movement that may be for their benefit as a class or for the benefit of the Railway Mail Service of the United States of America and to make provision for the payment of benefits to its members and their beneficiaries in case of death or permanent physical disability as a result of accidental means. The membership is limited to male railway postal clerks of the United States Railway Mail Service. (Pl.'s Ex. 2, Articles 1, 2 and 3, Constitution, etc. p. 4).

It has a beneficiary department to the privileges of which all its members are entitled.

The Constitution of the Association relating to the beneficiary department (Ex. 2, pp. 25-26, Article 16, Sec. 3 of the Charter) provides,

“Members leaving the Railway Mail Service

through removal, resignation or transfer (except an arbitrary transfer to another branch of the Government service, shall forfeit their membership in the Railway Mail Association.”

Article 16, Section 9 (Pl.’s Ex. 2, pp. 31-32) provides for the payment of benefits in the event of accidental death, the payment being conditioned upon proof of death by accidental means alone of any member of the beneficiary department of the Association.

Fred I. Babbitt prior to February 1, 1924 was a member of the Railway Mail Association and on that date procured from it Plaintiff’s Exhibit 1. This certificate on its face provides that the Charter or Articles of Incorporation, the Constitution and By-Laws of the Association and all amendments shall constitute a part of the agreement between it and the member. Mr. Babbitt was retired from the Railway Mail Service in 1928. At that time he was suffering from either multiple sclerosis or transverse myelitis, and for that reason was permanently and physically precluded from following such occupation. His association with the Railway Mail Service was completely severed and according to the Charter, Constitution and By-Laws of the Association he automatically ceased to be a member.

His physical condition became steadily worse and the disease effected a complete paralysis of his right leg. He fell in his home June 9, 1943, striking his *left* hip resulting in a fracture of the left femur or hipbone. He died in a Seattle hospital on the 30th of July following. Prior to the time of the accident

he had a complete paralysis of his *right* leg. His physical condition is illustrated by the succinct statement of one of his physicians, Dr. Rex B. Palmer dated July 9, 1943 (Pl.'s Ex. 4) where the Doctor stated:

“This is a man of about 65 years of age that has had transverse myelitis over the past 15 years. He has almost a complete paralysis of his right leg. He was walking with difficulty and slipped on a floor rug, falling on his good leg and fractured his right hip. It was decided that a wall leg splint would be the best form of treatment for the fracture of the hip”.

His widow brought action against Railway Mail Association to recover claimed death benefits under plaintiff's exhibit 1, alleging in her complaint, which was filed in the King County, Washington Superior Court in substance that Fred I. Babbitt died in Seattle, July 30, 1943; that the certificate was issued to him February 21, 1924 while he was a railway postal clerk in the railway mail service of the United States; that he became afflicted with multiple sclerosis and was retired as a railway postal clerk in 1928, and that from then until his death he was wholly and continuously disabled from following that occupation because of his physical condition and the multiple sclerosis with which he was afflicted; that he paid dues and special assessments to the Association during the remainder of his lifetime; that because of accepting these payments the Association modified the agreement consisting of the certificate (Pl.'s. Ex. 1) and the Charter, Constitution and By-

Laws, and waived the provision that there should be no compensation for bodily injuries received unless such should wholly and continuously disable the insured from following his occupation as a postal clerk, and further modified and waived any provision that accidental death should result independently and exclusively from any other cause, and further waived the provision that there should be no liability whatever under the certificate when disease, defect or bodily infirmity is a contributing cause of death, for the reason that the Association knew that the insured was suffering from multiple sclerosis and unable to follow his occupation as a postal clerk. Plaintiff further alleged that the insured slipped on a rug in his home in Seattle, fractured his left hip and died on July 30, 1943; that a claim was filed with the Association which was rejected.

Defendant answered the plaintiff's complaint (Tr. 9) denying all of these allegations except that the certificate was issued to the insured as alleged in the complaint and the death of the insured. The defendant specifically denied that there was any modification of the certificate and the Charter, Constitution and By-Laws of the defendant insofar as applicable to the insured or that any part of them was modified or changed. Plaintiff filed a reply (Tr. 15) which was stricken but which contained the statement,

“* * * and the defendant became obligated to pay upon its beneficiary certificate even though Fred I. Babbitt was unable to perform the duties

of a railway postal clerk and even though the disease, defect or bodily infirmity he had on July 31, 1928 might have been a contributing cause of his death."

Plaintiff made a demand for a jury trial. The demand was stricken and the court ordered that the jury act only in an advisory capacity (Tr. 23). At the time of the trial the court ordered an oral amendment to the complaint, which changed the theory of the cause of action, changing it from an equitable to a legal one and eliminating entirely the issues raised by the pleadings existing at the time of trial that:

- (1) The defendant modified the agreement between the parties and waived the provision that compensable bodily injury shall wholly and continuously disable the insured from following the occupation of a railway postal clerk, and
- (2) also modified the agreement by waiving the provision therein that accidental death as therein defined as the sole result of accidental means alone, and
- (3) also modified the agreement by waiving any provision contained in it that there shall be no liability whatsoever when disease, defect or bodily infirmity is a contributing cause of death,

because the defendant knew that the insured was suffering from a physical affliction to the extent

that he was unable to perform the duties of a railway postal clerk.

No amended complaint was filed. During some of the argument and exchange of views at the commencement of the trial and prior to ordering the amendment the court stated (Tr. 25) that the initial issue that must be disposed of before the trial could proceed to the second issue was whether the contract of insurance was modified and whether the insurer would be estopped from denying such modification. The court further stated (Tr. 26) that the insured must be in a physical condition to carry on his work as a railway mail clerk before liability arose under the contract of insurance and the court further expressed the view (Tr. 33) that it appeared to the court that before any recovery could be had or even any consideration of a recovery be taken, because of the status of the pleadings it would be necessary to establish a modification of the contract, either express or implied. Exceptions were taken to the order of the Court which without directing that an amended complaint be filed, contained the following ruling in regard to the complaint which was then on file (Tr. 46),

“* * * your complaint as I understand it, would now read, at least in a general way, it would contain the allegation that you have in Paragraphs I and II, and III, and IV I assume would be stricken.

* * * * *

“Mr. Jarvis: May I take an exception to the ruling striking Paragraph IV, Your Honor?

* * * * *

"The Court: * * * Paragraph V would still remain in your amended complaint.

* * * * *

"The Court: Paragraph VI would be stricken:

"Mr. Jarvis: May I have an exception on the order striking Paragraph VI, for the reasons I stated in my argument?"

This took place before the jury was impaneled and the action was tried on the issues as so made up by the court with the original complaint available to the members of the jury showing no change or amendment on its face.

After the impanelling of the jury the trial then proceeded. Mrs. Jennie M. Babbitt, the beneficiary of the policy and the surviving widow, in substance testified that she was the surviving widow of the deceased and the beneficiary in the certificate (Tr. 48-49) and with a rather unusual amount of incompetent and prejudicial testimony which it was impossible to object to without creating a bad impression on the jury, and is illustrated by the following (Tr. 49):

"Q. When were you and Mr. Babbitt married?

A. June 18, 1902.

Q. And where? A. In Abilene, Kansas.

Q. Abilene, Kansas? A. In Abilene, Kansas.

Q. That is the General's home? A. Yes."

The materiality of this coincidence is quite striking and must have been of interest to the jury, as well as the fact that her oldest child, Frederick, had been in Germany 37 months and was still there. (Tr. 49-50).

Mrs. Babbitt then testified that her husband, the insured, was getting out of bed on the morning of June 9, 1943, when he fell on his left hip, breaking it and was taken to the hospital during the morning of that day. There was no mention made in Mrs. Babbitt's testimony of the fact that the insured's right leg was almost completely paralyzed as set out in his Doctor's statement (Pl.'s. Ex. 4). Although during Mrs. Babbitt's testimony that exhibit had been marked as such, it was not made available to the defendant as it was not offered until nearly the close of plaintiff's case during the testimony of one of plaintiff's experts (Tr. 104) and, was not available until then for the purpose of cross-examination. During Mrs. Babbitt's testimony (Tr. 91), plaintiff offered plaintiff's Ex. 5 which was admitted as an exhibit. This was a picture of the insured taken ten years before and was, over objection of defendant's counsel, admitted without other or further explanation, identification or expert testimony in regard to it.

Frank W. Fells, a business manager of the Seattle General Hospital brought into court and there was identified by him, an envelope which he stated contained x-rays and clinical reports pertaining to the insured, of none of which he had personal knowledge. He did not take them from the files of the hospital. They were not admitted in evidence until the plaintiff's last witness was testifying. This exhibit is a cardboard folder containing 4 x-ray pictures and at least 10 other records, none of which were iden-

tified, separately marked or explained in any way other than such testimony as Dr. Don Palmer (one of plaintiff's witnesses) gave in regard to the x-rays only and before they were offered and admitted. In addition to Mrs. Babbitt's testimony, plaintiff's case was practically made up of the testimony of two physicians, Dr. Don H. Palmer and Dr. Conrad Jacobson.

Dr. Palmer attended the deceased in conjunction with his son, Dr. Rex B. Palmer who was not available at the time of the trial. Dr. Don Palmer testified at the trial not only as to facts but also as an expert. He did not perform an autopsy or attend the decedent during the last days of his life. Dr. Rex B. Palmer made a medical proof of death (Df. Ex. A2) which reads as follows:

"I, Rex B. Palmer, being first duly sworn, depose and say that I examined the body of Fred I. Babbitt, deceased, of Seattle, Washington, on the 29th day of July, 1943, at 7 P.M., and to the best of my knowledge and belief death resulted from the following causes:

Fracture of left femur 7-9-43

Multiple Sclerosis since 1928 (approx)

Fat embolus to brain & lungs 7-17-43

completely unconscious for 13 days prior to death.

/s/ Rex B Palmer.

Dr. Conrad Jacobson, who was called as an expert, stated (Tr. 102) that he had never seen the insured; that he had had a conversation with Dr. Palmer; that he had examined unspecified and undesignated hospital records (Tr. 103); that he had examined part of the autopsy report (Df. Ex. A1);

that he had heard some of it discussed in the court room, and on this gave his opinion, both hypothetically and actually, as to the cause of death.

Verdict was rendered for the plaintiff. Defendant filed an alternate motion for judgment or new trial (Tr. 184) which was overruled and judgment was entered on the verdict, from which appeal was taken to this court.

SPECIFICATIONS OF ERRORS RELIED ON

1. To recover under the certificate or insurance contract involved in this action (Pl.'s Ex. 1) the plaintiff must prove the existence of the policy; that the insured was a member of the defendant association in good standing at the time of his death; that he sustained an accident resulting in death; that death resulted wholly from accidental means and that disease, defect or bodily infirmity did not contribute to his death.

2. The court erred in permitting the amendment of plaintiff's complaint at the time of trial, changing the cause from an equitable to a legal one, triable by jury, and the Court erred in any event in not directing the filing of a written amended complaint, and the Court erred in disregarding the order previously entered directing the trial of any legal issue in the case by an advisory jury, and further erred in eliminating from plaintiff's complaint all questions of waiver of the terms of the contract (Pl.'s Ex. 1) and directing that all issues of fact be tried by jury.

3. The Court erred in overruling defendant's mo-

tion for a directed verdict at the conclusion of plaintiff's case (Tr. 118) both on the ground of insufficiency of plaintiff's evidence, and also because the evidence was such that any verdict of the jury could only be based on speculation and conjecture.

4. The Court erred in the admission of evidence including plaintiff's Exhibits 4 and 5 and technical evidence and opinion of doctors and answers to claimed hypothetical questions. (Full substance of testimony objected to and admitted is set out in the specification in regard to such error when discussed.)

5. The Court committed errors of law during the trial in addition to those hereinabove specified by

- (a) Failing to direct the jury to bring in a verdict for the defendant at the conclusion of the plaintiff's testimony.
- (b) By overruling defendant's alternative motion for judgment notwithstanding the verdict or for new trial.
- (c) By entering judgment for the plaintiff.

ARGUMENT

Specification of Error 1

To recover under the certificate or insurance contract involved in this action (Pl.'s. Ex. 1) the plaintiff must prove the existence of the policy; that the insured was at the time of his death a member in good standing of the defendant association; that he sustained an accident resulting in death; that death resulted wholly from accidental means and that disease, defect or bodily infirmity did not contribute to his death.

Plaintiff's original complaint which was unamended up to the time of the impaneling of the jury at

the time of the trial alleged the issuance of the certificate (Pl.'s Ex. 1) to the insured, the payment of premiums (Tr. 4), the modification of the terms of this agreement, and the waiver of the provisions that accidental death shall result independently and exclusively of any other causes, and there should be no liability when disease, defect or bodily infirmity is a contributing cause of death. By such allegations plaintiff admitted in the plain language of the complaint that the defendant waived that portion of the certificate providing that there should be no liability if disease, defect or bodily infirmity should be a contributing cause of the death of the insured. By making such allegations in the complaint the plaintiff admitted that disease, defect or bodily infirmity was a contributing cause of the death of the insured, and such was part of the record. The Court directed that the complaint be orally amended at the time of trial. No written amended complaint was filed (Tr. 46-47). Having admitted that disease, defect or bodily infirmity was a contributing cause of death by alleging the waiver of the part of the policy denying benefits under it when such should contribute to the insured's death, plaintiff voluntarily injected and raised that issue and put the defendant to the defense of such issue, the plaintiff then, pursuant to order of Court, changed entirely her cause of action to a legal one to recover according to the terms of the policy. As a matter of law, exclusive of any fact which might be found by the jury or adjudicated by the Court, the defendant had admitted the death of the insured came within the terms of the exception contained

in the policy. No implied or actual waiver of any of the terms of the policy was proved. At the conclusion of plaintiff's testimony the record then showed that the plaintiff had admitted that disease, defect or bodily infirmity was a contributing cause of death by so pleading it in her complaint, and there was no proof that the terms of the policy the Charter, Constitution or By-Laws, had been waived or amended, actually or impliedly as there was no such pleading or issue.

There was no written amended complaint filed. The only amendment was contained in oral directions and orders of the Court (Tr. 46-47). The original written complaint was available at all times as part of the record for the inspection of the jury with all of its original allegations which were not part of the issues as finally framed over the defendant's objections (Tr. 46-47). We cannot speculate as to how these allegations and admissions may have influenced the minds of the members of the jury.

Sometime before the trial the plaintiff made a demand for a jury trial, which was stricken, and Judge Black who was then hearing matters in connection with the case subsequently ordered that a jury be impaneled at the time of the trial to act only in an advisory capacity (Tr. 23). As heretofore stated, at the time of the trial the Court ordered an oral amendment to the complaint changing the theory of the cause of action and eliminating entirely the issues raised by the pleading existing at the time of trial.

The failure of a party to serve the required demand

for a jury trial constitutes a waiver of a trial by jury. Failure to serve such a demand is a legal waiver whether it is inadvertent or intentional.

McNabb v. Kansas City Life Ins. Co. (C.C.A. 8), 139 F.(2d) 591.

The situation at the time of the trial was almost identical to the facts found in *Bercovici v. Chaplain*, 56 F. Supp. 417. There the district judge had ordered a non-jury trial of one count. The matter then came before another judge, the same as in this case before this court. After the first judge had ordered a non-jury trial, the plaintiff proposed an amendment to the count which had been ordered tried without a jury. The judge before whom the motion to make the proposed amended was urged, stated that another judge had ordered this particular issue to be tried without a jury; that the amendment would convert from an equitable one to an action at law and would bring about defeat of the first judge's order that the trial be without a jury. The judge further stated that he favored jury trials in cases having human elements, and

“As I see it, the situation is this: The plaintiff elected to state the third count of the amended complaint in equity. Based on this the court directed that the count be tried without a jury. Now the plaintiff seeks to alter the phraseology of what, in essence, is fundamentally the same cause of action, so that (irrespective of his intention), if the proposed substitute were allowed, this cause of action would be triable by a jury. As I view the matter, such a result would

frustrate Judge Rifkind's order. I do not feel free to do that.

"Accordingly, if there be a ruling on the proposed new supplemental complaint as a whole, I think I am bound to deny the motion."

In order to avoid a dismissal of plaintiff's complaint at the conclusion of plaintiff's testimony (Tr. 118) it was necessary for the plaintiff to prove that the insured was a member of the Railway Mail Association at the time of his death and that the beneficial certificate was in force, and that the manner of the insured's death was within the terms of the policy to entitle the beneficiary to recover; or to prove a waiver of the constitution and by-laws of the Association and the terms of the policy because plaintiff's complaint and the pleadings show

(1) The defendant was not a member of the Railway Mail Service at the time of his accident and death within the meaning of the constitution and by-laws.

(2) The plaintiff's pleadings admitted that disease, defect or bodily infirmity was a contributing cause of death.

(Pl.'s Ex. 2, pp. 25-26, Article 16, Section 3 of the Charter, and Pl.'s Ex. 1).

Through the amendment of the complaint over the defendant's objections, all issues of waiver were eliminated entirely so that there was eliminated by the plaintiff from the pleadings and issues any question of waiver of Section 3, Article 16 of the Charter of the Association as well as any question of waiver of any restrictive terms of the certificate. After

the issues were finally made there was no pleading, proof or record of any legally effective waiver binding upon the Association of any of the terms of the constitution, by-laws and policy, and, therefore, plaintiff's complaint as purported to be amended and the issues as finally tried with plaintiff's admissions that the insured left the Railway Mail Service before his death and the additional admission that disease, defect or bodily infirmity contributed to death, neither constituted nor made a cause of action against the defendant.

In *McKillips v. Railway Mail Association*, 10 Wn. 2d 122, 116 P.(2d) 330, a similar contract was discussed and the Supreme Court of this state stated that

"The wording of the certificate before us above quoted is definite and precise. * * * This language is plain and unambiguous, and the courts have no authority to enlarge appellant's liability under its contract beyond the plain terms thereof."

In *Metropolitan Life Ins. Co. v. Foster* (C.C.A. 5), 67 F.(2d) 264, the court stated:

"We have no more right to enlarge the liability by artificial construction of the policy than to increase the penalty of a bond or raise the face of a promissory note."

In *Order of the United Commercial Travelers v. Nicholson* (C.C.A. 2), 9 F.(2d), 7, the court stated in referring to a similar contract,

"These various provisions constitute a part of the contract which these parties made, and by which their rights are to be determined."

There is no record or proof in this case that any local officer of the Association was authorized to waive, alter, or amend any terms of the constitution, by-laws or the policy, and any attempted waiver would be in excess of the authority of any such officer and the insured charged with notice that such officer would be exceeding his authority.

National Council, J.O.U.A.M. v. Thompson, 153 Ky. 636, 156 S.W. 132, 45 L.R.A. (N.S.) 1148.

Specification of Error 2

The Court erred in permitting the amendment of plaintiff's complaint at the time of trial changing the cause from an equitable to a legal one, triable by jury, and the Court erred in any event in not directing the filing of a written amended complaint, and the Court erred in disregarding the order previously entered directing the trial of any legal issue in the case by an advisory jury, and further erred in eliminating from plaintiff's complaint all questions of waiver of the terms of the contract (Pl.'s Ex. 1) and directing that all issues of fact be tried by jury.

The argument in regard to this Assignment of Error is largely set out under Assignment of Error 1. The situation in regard to defendant's demand for trial by jury is almost identical to that which existed in *Bercovici v. Chaplain*, *supra*.

Specification of Error 3

The Court erred in overruling defendant's motion for a directed verdict at the conclusion of plaintiff's case (Tr. 118) both on the ground of insufficiency of plaintiff's evidence, and also because the evidence was such that any verdict

of the jury could only be based on speculation and conjecture.

We believe that the testimony of Dr. Conrad Jacobson and his opinions were entirely incompetent. The only other testimony that the deceased's death came within the terms of the policy was that of Dr. Don H. Palmer who made certain statements in regard to it which we believe were solely within the province of the jury. Eliminating the irrelevant and incompetent testimony, there is nothing in the record except supposition and speculation as to the cause of death. For instance, the record shows that the deceased was suffering at the time of his death from arterial sclerosis (Df. Ex. A1) as well as multiple sclerosis and transverse myelitis. Dr. Jacobson was asked in referring to whether or not the deceased could have died from disease the following question and gave the following answer (Tr. 115):

“Q. Could he have had it from arterial sclerosis?”

A. I don't think so. It is all supposition.”

Dr. Don Palmer (Tr. 96) testified that he entirely agreed with Dr. Rex Palmer's diagnosis of the case and they were associated together on it. Dr. Rex Palmer swore that to the best of his knowledge and belief death resulted from three causes: Fracture of the left femur, multiple sclerosis, and fat embolus to brain and lungs (Df. Ex. A2).

The case is squarely within the wording of *Atchison, etc. v. Toops*, 281 U.S. 351, 74 L. ed. 896, 50 S. Ct. 281, where the Supreme Court stated:

“The jury may not be permitted to speculate

as to its cause, and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer.”

Also, *Patton v. Texas & Pacific, etc. Co.*, 179 U.S. 658, 45 L. ed. 361, 51 S. Ct. 275, where the Supreme Court stated:

“And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion.”

And also, *Mutual Life Ins. Co. v. Hassing* (C.C. A. 10) 134 F.(2d) 714, where the Court stated:

“But it is not essential to a verdict for the defendant that the evidence should repel any other hypothesis than the one advanced by it. It is incumbent upon plaintiff to take the case from without the realm of speculation, conjecture and surmise and create a factual basis from which a reasonable inference can be drawn. Failing in this, plaintiff cannot prevail.”

The plaintiff did not sustain the burden of proof that the fall was caused by accidental means alone and that disease, defect or bodily infirmity did not contribute to the cause of the fall. Plaintiff showed by her own testimony that the insured had almost a complete paralysis of his right leg (Pl.’s Ex. 4, Personal History Sheet). There is nothing in the

record at all indicating the fall was caused by accidental means and the accidental element of the fall comes squarely within the following:

New England Mutual Life Ins. Co. v. Flemming (C.C.A. 9) 102 F.(2d) 143, where the court stated:

“Moreover, in the absence of a showing of some accidental means causing the fall it cannot be said that the fall alone was proof of accidental means for it is quite as likely to result from some bodily infirmity. The burden of proof was upon the plaintiff.”

Also, *Wallace v. Standard Acc. Ins. Co.* (C.C.A. 6) 63 F.(2d) 211, where the court stated:

“There was medical testimony tending to show that the insured died as a result of cerebral hemorrhage superinduced by the fall or some damage to his skull caused by the fall, but we find no substantial evidence to support the essential allegation of the petition that the fall itself was caused by stumbling independently and exclusively of any and all other causes. There is no room for any presumption that it was so caused. This was purely a question of fact and the burden was upon appellant.”

The certificate provides

“Accidental death shall be construed to be either sudden, violent death from external violent and accidental means, resulting directly, independently and exclusively of any other causes, and not the direct or indirect result of the member's own vicious or unlawful conduct; or death within one year, as the sole result of accidental means alone. There shall be no liability whatever

when disease, defect or bodily infirmity is a contributing cause of death.”

The obvious purpose of the certificate is to protect the members of the Association while engaged in their occupation of railway mail clerks. As the name implies, the members of the Association handle and sort the mail on moving trains. The occupation is more hazardous than the usual one and the purpose of the certificate is to protect the members and the beneficiaries from the accidental hazards of such occupation. As heretofore stated, Article XVI, Section 3, of the Charter, Constitution, and By-Laws, which relates to the beneficiary department of the Association, provides that members leaving the mail service forfeit their membership in the Association. The certificate specifically provides that the accidental death must result from accidental means * * * or death within one year as the sole result of accidental means alone. As frequently stated by the courts, an accidental result which is not caused by accidental means does not come within the terms of this or a similar policy. The same kind of policy was before the Court of Appeals in *Railway Mail Association v. Stauffer*, 152 F.(2d) 146.

The Court there held that the plaintiff's evidence did not support the judgment, and the facts are so similar and the reasoning so applicable to this case that we take the liberty to quote at the following length from the Court of Appeal's decision:

“It will thus be seen that the insurance company did not agree to be liable for *any* accidental

death, but only for (a) a sudden death which was caused by 'external, violent and accidental means,' or (b) death within one year as the sole result of accidental means. The 'accident' relied on by the appellee in the count of the complaint involved in this appeal was the attempt to move, and the consequent rupture. It occurred very shortly before death. So, the death was sudden, but there is no proof that it was caused by external, violent and accidental means. For the insurer to become liable, the death must result 'directly from such accidental means, independently and exclusively of any other causes.' It is to be noted also that the contract stipulates that 'There shall be no liability whatever when disease, defect or bodily infirmity is a contributing cause of death.'

"* * * We are of the opinion that the evidence in the case at bar does not establish liability as defined in the certificate of insurance. There is no proof that any unforeseen or unintended condition or combination of circumstances, external to the decedent's body, contributed to his death. Nor does the evidence show that there was anything accidental, unforeseen, involuntary or unexpected in Stauffer's effort to rise. Mrs. Stauffer is the only witness who testified, or could have testified, about what took place at that time. She said nothing in her description of the incident on which there could be based an inference that the means which Stauffer voluntarily employed to get out of bed included anything unforeseen, unexpected or unusual. In this, the facts of the present case differ from the facts considered by the Supreme Court in *U. S. Mutual Accident Association v. Barry*, 131 U.S. 100, 9 S. Ct. 755, 33

L. ed. 60. There Dr. Barry voluntarily leaped from a platform four or five feet to the ground below. He suffered an injury from which death resulted, although previously he had been a vigorous, sound and healthy man. The Supreme Court held that the trial court had acted properly in leaving it to the jury to determine whether after Barry left the platform, or in the act of alighting, there was some unexpected or unforeseen or involuntary movement. In the present case there was no such question to submit to the jury, nor was Stauffer sound body before he attempted to raise himself by his elbows; on the contrary, his body was frail and diseased, except for which the movement could not have caused the hemorrhage.

“As the company agreed to pay only if accidental means caused an injury which produced death, independently and exclusively of any other causes, it follows that the evidence does not support the judgment.”

In the instant case before this Court the only testimony about the means which established the accidental result, as in the *Stauffer* case, is the testimony of the beneficiary of the policy. In each instance the beneficiary was alone with the insured. The beneficiary in the *Babbitt* case testified that he stood up (Tr. 53) to pull on the arms of his underwear and he turned to get the sleeve in on the first side. At that time he was standing on a rug which was loose at the corner and he slipped and fell on his left side. The only movement that he made was to put his left arm into the arm of the underwear (Tr. 85).

The insured at this time was suffering from almost

a complete paralysis of his right leg (Pl.'s Ex. 4). There was no physical movement preceding the fall other than the attempt to put one of his arms into the arm of the underwear. The standing up on the rug was not an accidental means. It was a voluntary action on his part. The twisting of the body was not an accidental means as that was also a voluntary action on the insured's part. It is self-apparent in view of the facts in this case that the rug could not have slipped of its own accord. Prior to falling the insured was perfectly balanced and firm (Tr. 85). There is no testimony that the rug slipped which would have been a physical impossibility without a movement on the insured's part, and there is no testimony that the fall caused the rug to slip or the slipping of the rug caused the fall. If the fall caused the rug to slip there was no accidental means causing the accidental result. The fall could have been caused by the paralysis of the right leg. The rug could not have slipped without a physical movement by Mr. Babbitt. If turning his arms and shoulders was this movement which caused the rug to slip, that was voluntary on his part and was not an accidental means. No matter how unfortunate the accidental result may have been there is no testimony in the record in this case, and there could not be, that the rug slipped before he started to fall so that the slipping of the rug must have been caused either by a voluntary act on his part, which of course was not an accidental means, or was caused by the fall.

The fall could have been caused by the paralyzed right leg and the facts and applicable law on this point are practically the same, as in:

Wallace v. Standard Acc. Ins. Co., Supra,
Railway Mail Ass'n. v. Stauffer, Supra,
 and *White v. New York Life Ins. Co. (C.C.A. 5) 145*
F.(2d) 504, where the Court stated:

“By the weight of authority a means is not made accidental because some unexpected result follows in addition to that which was intended to be accomplished.”

The fall itself did not establish an accidental result caused by accidental means. There is no question that the burden of proof was on the plaintiff to establish not only an accidental means but the accidental result. The statement that he slipped on a rug does not establish the accidental means. In the *Wallace* case, the Court stated:

“* * * but we find no substantial evidence to support the essential allegations of the petition that the fall itself was caused by stumbling independently and exclusively of any and all other causes. There is no room for any presumption that it was so caused. This was purely a question of fact and the burden was upon appellant.”

Judge Wilbur stated in *New England Mut. Life Ins. Co. v. Flemming, supra*:

“* * * Moreover, in the absence of a showing of some accidental means causing the fall it cannot be said that the fall alone was proof of accidental means for it is quite as likely to

result from some bodily infirmity. The burden of proof was upon the plaintiff."

Specifications of Error 4

Admission of Plaintiff's Exhibit 4

The Court erred in the admission of evidence including plaintiff's Exhibits 4 and 5 and technical evidence and opinion of doctors and answers to claimed hypothetical questions.

FRANK W. FELLS,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Savage:

Q. Will you tell the Court and jury your full name? A. Frank W. Fells.

Q. Frank W. F-e-l-l-s? A. Right.

Q. And what is your business, Mr. Fells?

A. Business manager of the Seattle General Hospital.

Q. And how long have you been the business manager of the Seattle General Hospital?

A. Going on fourteen years.

Q. Fourteen years? A. Yes.

Q. And in your capacity as general manager of that hospital, are the hospital records under your general supervision? Do you have general custody of them? A. Yes, sir.

Q. Now in response to a subpoena duces tecum,

have you brought with you X-rays and clinical reports—that is, the clinical reports and X-rays appertaining to Fred I. Babbitt?

A. Yes I have.

M. Savage: May I have them, please?

Q. These are a part of the permanent records of the Seattle General Hospital?

A. That is right.

Q. And are kept in the regular course of your business as a general hospital, is that right?

A. Yes, sir.

Q. Now you don't know anything about the details of the exhibit, what they contain—that is, you did not write them up or take the X-ray pictures, is that right? A. Yes, sir.

Mr. Savage: You may cross-examine.

Cross-Examination

By Mr. Jarvis:

Q. You have no personal knowledge of the contents, Mr. Fells? A. No.

Q. You don't know what doctors or technicians prepared those, do you? A. No.

Q. You just took them out of the file in the hospital?

A. I had the record clerk in charge take them out.

Q. You did not do it yourself?

A. No.

The Court: As I understand, you have offered them?

Mr. Savage: Not yet, no. That is all.

(Witness excused." (Tr. 66-67)

Mr. Savage: First of all, Your Honor, please, I offer in evidence Plaintiff's Exhibit 4 for identi-

fication, which are the X-rays and hospital records of the Seattle General Hospital relating to the case of Fred I. Babbitt from July 9 up to and including the day of his death.

The Court: Any objection?

Mr. Jarvis: They have not been sufficiently identified in this case and for that reason I do (not) object to them.

The Court: The X-rays have been sufficiently identified. I do not think the hospital records were.

Mr. Savage: I think the hospital records were identified as a part of the permanent records of the Seattle General Hospital by Mr. Fells, who is the custodian thereof, and kept in their usual and regular course of business, Your Honor.

The Court: I think that is correct, Mr. Jarvis. Objection will be overruled and exception allowed, and it will be admitted in evidence.

(Whereupon hospital records and X-rays referred to were received in evidence and marked Plaintiff's Exhibit No. 4). (Tr. 104-105)

In the State of Washington, hospital records are regarded as hearsay testimony and are inadmissible. *Toole v. Franklin Inv. Co.*, 158 Wash. 696, 291 Pac. 1101 has never been overruled in this State. In that case it was directly decided that

"The rule seems to be well established that such records are hearsay testimony, * * * We must, therefore, hold that these records are inadmissible."

(Records referred to are hospital records).

Dunn v. Buschmann, 169 Wash. 395, 13 P. (2d) 69.

The most serious objection to the introduction of the hospital records, is the fact that a folder was introduced containing a still unnumbered, unmarked collection of papers, X-rays and other reports, documents, papers and writings. No effort was made to associate a large part of these with the case or identify them as applicable or explain them. We don't know now the number of them, nor the relevancy nor the materiality, other than the mere fact that they purport to be hospital records. When or how or under what circumstances they were made, whether in or out of the hospital, by a nurse or attendant, and what they were intended to prove or explain was left entirely unexplained. They weren't even numbered or identified so as to give the defendant an opportunity to identify them, object to them or make any record in regard to them. It was as though a brief case had been introduced containing an unspecified, unidentified number of photographs, papers and documents by identifying the case or container. Certainly neither the folder itself nor the fact that it contained papers, documents and photographs was relevant or material. Possibly some of the X-rays were used in Doctor Palmer's testimony but they were not marked nor identified. None of the other contents of this folder were referred to except as hospital records or identified or numbered as exhibits. If it was necessary to use expert testimony to explain the cause of death certainly the jury could not deduce that death was caused either from disease or bodily defect or accident, from an unexplained and unidentified mass of

technical and medical terms, phraseology and records, admittedly unintelligible to the layman and which it was necessary in a proper way to explain by the person who made such records or the doctor in attendance or at least by expert testimony. To show the position that we were placed in, Dr. Jacobson testified that his conclusions were based on hospital records examined prior to the trial. We don't know what records he examined, whether those introduced and whether all or part. We do not believe that we have to go on the indefinite conclusion that the unspecified, unidentified and unexplained contents of a folder contain all or part of records examined by this expert or the other doctor and whether they are all or part of the entire record in Mr. Babbitt's case. It must be remembered that the entire folder or envelope was introduced as one exhibit. (Plaintiff's Exhibit No. 4). It went to the jury with all its unidentified and unexplained contents.

The vice of such a situation is illustrated by *Oxford Paper Co. v. U. S.*, 56 F.(2d) 895, where the Court stated:

"The mere filing of a document or instrument with the clerk is neither offering or introducing it in evidence;"

In our case we don't even know now what instrument, photograph or document contained in the hospital records was referred to by either of the doctors nor do we know which X-rays or photographs Dr. Palmer testified about or which one Dr. Jacobson examined.

“However, it has been held that where documentary evidence is offered, each piece should be presented by itself to the court, exhibited, if desired, to the opposing counsel, identified by the court or steographer with suitable marks, and, if objected to, its genuineness established by testimony. * * * Documentary evidence should not be introduced in gross. Letters should not be admitted in mass for the jury to read or not as they please.” 64 C. J. 115

In *Schmeller v. United States* (C.C.A. 6) 143 F. (2d) 544:

The Court stated:

“A more difficult question is presented by the contention that the court committed prejudicial error in its instructions to the jury on the evidence. The court admitted Exhibits 1 to 46 en masse. This constituted a group of documents, some unsigned and some containing hearsay, taken from the files of and kept in the regular course of business by the Foundry Company, and stated to have been made, or ‘presumably’ to have been made at or about the time of the transactions to which they refer. They were admitted as falling within the purview of Sec. 695, Title 28, U.S.C., 28 U.S.C.A. Sec. 695. As to certain of these documents we think that this admission en masse was error. The purpose of the enactment of Sec. 695 was to eliminate the technical requirement of proving the authenticity of business records and memoranda by the testimony of the maker. *Landay v. United States*, 6 Cir., 108 F.(2d) 698, 705. The mere fact that the paper offered in evidence is taken from a business file and is otherwise proved in compliance with Sec. 695 does not establish its competency. It is ques-

tionable whether all of the papers offered in evidence in this mass of exhibits were made as memoranda or records. It is also questionable whether all of the matters to which they related were relevant. Section 695 in no way repealed the ordinary requirements of relevancy and competency. The District Court should have examined and ruled upon each paper separately, and should have excluded the hearsay and other incompetent evidence."

Assume the admissability under Title 28, U.S.C., 28 U.S.C.A. 695 the facts in this case come squarely within the statement of the Court in the Schmeller case in which the Court said that the admission of the documents en masse was error. In the case before this Court we have a number of unspecified, unmarked papers, documents, photographs, reports, receipts, certificates, opinions, and histories some of which undoubtedly are immaterial, such as the receipt for the body, the list of clothing and other papers which were not made a part of the record. In the Schmeller case the exhibits were numbered although admitted en masse. In the Babbitt case the exhibits were not even numbered or identified but an envelope containing an unidentified and unspecified number of papers was admitted over objections.

(b) Admission of Plaintiff's Exhibit No. 5

Q. Directing your attention to what has been marked Plaintiff's Exhibit 5 for identification, Mrs Babbitt, can you tell us what that is?

A. This is a picture of my husband. taken approximately ten years ago.

Mr. Jarvis: Your Honor, I don't know as this picture is relevant. I object to it on that ground.

The Court: It is relevant unless it is taken too remote in time. She says it was taken—

Q. Was it taken after he retired from the Railway Mail Service?

A. Yes, about four years afterwards.

Mr. Savage: I offer it then. I think it is material with respect to his condition.

Mr. Jarvis: It is 1932, Your Honor.

Mr. Savage: After counsel contended he had been diagnosed suffering from a defect which, under the terms of their answer, contributed to his death, and I think that his appearance as indicated by this picture is material.

The Court: The objection will be overruled. It may be admitted in evidence.

Mr. Jarvis: Exception, Your Honor. (Tr.)

Plaintiff, over defendant's objection, introduced in evidence plaintiff's Exhibit 5, a picture of Mr. Babbitt while Mrs. Babbitt was on the witness stand. At the time the picture was introduced in evidence it was referred to by Mrs. Babbitt in probably a not unnatural tearful manner. Mr. Babbitt died in the summer of 1943. The picture, it developed on cross-examination, was taken in 1932. It was admitted it was not taken for the purpose of establishing any medical history or condition of the subject of the photograph. It was an ordinary picture such as is usually taken for a family purpose. It added nothing to any testimony as to the physical and mental condition of Mr. Babbitt. It was apparently and purely put in for the sole purpose of influencing the jury,

and as such we believe it was not material and certainly was prejudicial.

By calling expert witnesses the plaintiff admitted the necessity of expert testimony. No members of the jury could determine from a photograph taken under unknown circumstances and conditions in 1932, whether or not Mr. Babbitt was suffering from a disease, the course, duration and extent of which was entirely internal and which could only be but was not described by expert testimony. The immateriality of the photograph is illustrated by the fact that it was not referred to in any way or at any time in the testimony of either of the doctors called by plaintiff. A photograph of Mr. Babbitt during his last illness or of his body after his death might have been made relevant than a photograph made in 1932, but certainly would not have been, in any event, material unless it proved a part of plaintiff's case. What part of plaintiff's case was proven by the photograph? Counsel goes on the assumption that the photograph itself is all that is necessary to prove conclusively its materiality and relevancy. It did not prove, in any way, the course, duration or condition of the disease at the time the photograph was taken. Obviously from a layman's point of view it couldn't do so even if that was an issue in the case. It was not used in any of the expert testimony. There was no testimony by the photographer or maker of the photograph that it was a simile of its subject or had not been retouched. It was used purely and purposely to influence the jury. It was marked, offered and intro-

duced over objection, referred to by the plaintiff, who then wept. She was admonished by counsel to attempt to control herself, solicitiously asked if she were able to do so. The photograph was then, under these conditions, handed to the jury, inspected by each one of the jury, and never again referred to in any of the testimony. Such an apparent disregard of what should be an impassionate representation of facts is certainly alien of aspects of a trial fair to a defendant insurance association, which at best is always laboring under disadvantage. Mrs. Babbitt, not being an expert, could not testify that the photograph either showed or did not show the course of disease or latent physical condition. The fact that the photograph was not used in the examination of either of the experts certainly showed its immateriality from a medical point of view and its apparent emotional appeal. The deceased died in July, 1943, not in 1932. Other than the fact that he had been afflicted with multiple sclerosis continuously since about 1926, his physical appearance prior to a short time before his death had no materiality, unless on the issue of waiver as pleaded in plaintiff's complaint. However, the question of waiver was eliminated by the Court in its recasting of plaintiff's pleadings so that it was not material on that or any other issue.

“Photographs should be excluded where they are irrelevant or immaterial. They should be excluded where they would confuse or mislead rather than aid the jury, distract the jury's attention from the main issue, or unduly em-

phasize the claims or the evidence of one of the parties, or where the natural effect of their introduction in evidence would be to arouse the sympathies or prejudices of the jury, rather than to throw any real light on the issues. " 32 C.J.S. 612

In *United States v. LaFavor* (C.C.A. 9), 72 F.(2d) 827) this Court reversed a case on the sole ground that an X-ray photograph was not sufficiently identified.

In *Finholt v. Seattle*, 139 Wash. 497, 247 Pac. 950, the Supreme Court of the State of Washington refused to admit pictures that were not taken under conditions sufficiently similar to those at the time of the accident to have them do more than confuse.

The only one who could or did testify in regard to the photograph was Mrs. Babbitt but any testimony that she might have given to explain the physical condition of the decedent would have been entirely incompetent.

"Where the disease is one the existence of which is discoverable only by a skilled physician by the ascertainment of existing symptoms, the question of whether such disease exists is not established by testimony, based only on observation of such person's outward appearance, that he then seemed to be in good health." *Scharlach v. Pacific Mutual Life Ins. Co.* (C.C.A. 5) 16 F.(2d) 245. The existence of this specific disease was a strictly medical question; the conclusions of laymen upon such an issue are without adequate basis, and, necessarily, mere speculation." *United States v. Clapp* (C.C.A. 2) 63

F.(2d) 793, 794. *Aetna L. Ins. Co. v. Kelley*
C.C.A. 8) 70 F.(2d) 589, 93 A.L.R. 471.

Specification of Error 4

(c) Admission of Dr. Palmer's Testimony and Opinions

Q. Well, Doctor, tell the Court and Jury whether in your opinion—whether or not Fred I. Babbitt died of a fat embolus which went to his lung and his brain?

Mr. Jarvis: Your Honor—just a minute, I object to that question on the ground that the witness is not permitted to testify as to the matter that must be decided by the jury, and that has been so decided.

The Court: Objection will be overruled.

Q. Now, Doctor, assume that Fred I. Babbitt was suffering from multiple sclerosis, or a transverse myelitis, and he had an accidental fall, with a fracture of the femur, and a terminal death due to a fat embolus going to the lung and the brain, in your opinion, would the multiple sclerosis or transverse myelitis be a contributing cause of death? A. No.

Q. If Fred I. Babbitt had never been afflicted with multiple sclerosis or transverse myelitis, and he had sustained a fall in which the large bone, or femur was fractured—sustained a comminuted fracture, which is broken up—in your opinion would death have probably resulted anyway?

A. Yes.

Mr. Jarvis: I ask that that answer be stricken, Your Honor, on the same grounds. I want to preserve that record.

Mr. Savage: You may cross-examine. (Tr. 77-78)

The foregoing testimony of Dr. Palmer is incompetent, irrelevant and immaterial for the reasons that:

(a) The Doctor could not give his opinion either as an expert or otherwise on the ultimate facts to be passed upon by the Court or jury.

(b) The questions did not purport to contain the record or evidence in the case. If the second question is a continuation of the first it purports to be a hypothetical question based on an assumption which obviously does not cover the evidence in the case, or that introduced and in the record at the time the Doctor was testifying. For instance, there is no evidence that the insured was suffering from either multiple sclerosis or transverse myelitis. The record is that he was suffering from both. At least, the plaintiff's own doctors had so diagnosed. The question does not contain any time element or the extent or the duration of the disease with which the insured was suffering nor the extent, duration or seriousness of them, nor does the question purport to cover the hospital records which were either prepared by this Doctor or his son, who was associated with him on this case.

The second question is obviously more objectionable as it likewise is asking for an ultimate conclusion which is for decision by either the Court or jury and being a hypothetical question it does not purport to cover the facts in the case surrounding the fall or injury, its severity or extent and certainly is based on the wrong hypothesis in that the record shows at that

time the insured had been prior to his death afflicted with disease, defect and bodily infirmity, whereas, the opinion of the Doctor is asked on an assumption of erroneous facts based on a supposed record or evidence that the deceased had never been afflicted with any disease, defect or bodily infirmity.

See also *Harrison v. New York Life Ins. Co.* (C.C. A. 6) 78 F.(2d) 421, and the decisions of this Court in *Deadrich v. U. S.*, 74 F.(2d) 619, and *U. S. v. Stephens*, 73 F.(2d) 695.

Moreover, it is the law in Washington that hypothetical questions propounded on direct examination must be based upon the testimony and evidence in the case and not upon suppositions. *Levine v. Barry*, 114 Wash. 623, 195 Pac. 1003. *Jones v. McQuesten*, 172 Wash. 480, 20 P.(2d) 838; *Newton v. Pac. Hwy. Trans. Co.*, 18 Wn.(2d) 507, 139 P.(2d) 725,

In *U. S. v. Spaulding*, 293 U.S. 493, 79 L. ed. 617, the Supreme Court stated:

“The medical opinions that respondent became totally and permanently disabled before his policy lapsed are without weight. Clearly the experts failed to give proper weight to his fitness for naval air service or to the work he performed, and misinterpreted ‘total permanent disability’ as used in the policy and statute authorizing the insurance. *Moreover, that question is not to be resolved by opinion evidence. It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge’s instructions as to the meaning of the crucial phrase and other questions of law. The experts ought not to have*

been asked or allowed to state their conclusions on the whole case."

Specification of Error No. 5

(d) Admission of Testimony of Dr. Conrad Jacobson

Q. Doctor, did you ever know Fred I. Babbitt?

A. I never saw him. I am only familiar with his history, *and my conversation with Doctor Palmer.*

(Testimony of Dr. Conrad Jacobson.)

Q. Have you examined the hospital records in the Seattle General Hospital?

A. I have examined the hospital records, yes.

Q. And during the time you were in the court room, I will ask you, Doctor, if you did not read and examine the Defendant's Exhibit A-1, which is an autopsy report of Fred I. Babbitt by Alfred L. Balle, pathologist?

A. I saw part of it, *and I heard some of it discussed here* in the court room.

Q. Doctor, reading to you from the anatomic diagnosis of Defendant's Exhibit A-1, item 1, fracture of left femur; 2, hemorrhagic infarct of both lungs, extensive infarction of the pons overlying the ventricles with area of necrosis and slight hemorrhage.

Tell, us, Doctor, whether you as an expert are able to form an opinion as to the cause of Fred I. Babbitt's death?

Mr. Jarvis: Your Honor, I object to that question as incompetent, irrelevant and immaterial, and as not covering the issues or the facts as developed in this case, and because it is based, or attempted to be [243] based on some records that is not produced nor in evidence in this case.

The Court: I understand the question is based not only on the reading there, but upon the doctor's examination of the hospital records, indicating when the patient came in——

Mr. Savage: Yes, and the reading of the Defendant's own exhibit, Your Honor.

(Testimony of Dr. Conrad Jacobson.)

The Court: Independent of any previous history perhaps, would not be a sufficient hypothesis to base an opinion, but if he is familiar——

Q. Basing your opinion upon the hospital records you have examined and the reading I have made just now——

Mr. Jarvis: May I have a further objection that the hospital records are not in this case at all.

Mr. Savage: They have not been admitted, but the doctor testifies that he did read them at the Seattle General Hospital.

Mr. Jarvis: That, Your Honor, is injecting an element into this case that is entirely outside of it right now.

The Court: I think perhaps you better frame your question a little broader, taking the history of this case from the date of the accident and as you contend the nature of the accident. [244]

Mr. Savage: First of all, Your Honor, please; I offer in evidence Plaintiff's Exhibit 4 for identification, which are the X-rays and hospital records of the Seattle General Hospital relating to the case of Fred I. Babbitt from July 9 up to and including the day of his death.

The Court: Any objection?

Mr. Jarvis: They have not been sufficiently

identified in this case and for that reason I do (not) object to them.

The Court: The X-rays have been sufficiently identified. I do not think the hospital records were.

Mr. Savage: I think the hospital records were identified as a part of the permanent records of the Seattle General Hospital by Mr. Fells, who is the custodian thereof, and kept in their usual and regular course of business, Your Honor.

The Court: I think that is correct, Mr. Jarvis. Objection will be overruled and exception allowed, and it will be admitted in evidence.

(Whereupon hospital records and X-rays referred to were received in evidence and marked Plaintiff's Exhibit No. 4).

Q. Now Doctor, taking into consideration the examination which you made of the hospital records at the Seattle [245] General Hospital of Fred I. Babbitt, of his disability from July 9 to July 30, inclusive, the day that he died, and also taking into consideration this language from Defendant's Exhibit A-1:

"Anatomic diagnosis: Fracture of left femur; hemorrhagic infarct of both lungs; extensive infarction of the pons overlying the ventricles with areas of necrosis and slight hemorrhage." Tell us, Doctor, whether you are able to form an opinion as to the cause of Fred I. Babbitt's death.

Mr. Jarvis: Just a minute, Your Honor, I object to that question.

The Court: Well, he may answer the question first "yes" or "no."

A. Yes, sir, I think I can.

Mr. Savage: Just answer "yes" or "no."

Q. What is your opinion, Doctor? Just a moment, don't answer.

Mr. Jarvis: Now may I make the objection that the question does not cover the evidence nor the record in this case, nor does it cover the elements that have been introduced in evidence relating to either the disease or the death of Mr. Babbitt?

The Court: Well of course I do not know what there is in the hospital records, if they show anything about the disease. It is admitted by all parties—it is not in dispute he was afflicted for a period of years.

Mr. Savage: I will add the further element for the Doctor's consideration, assuming also that Fred I. Babbitt was afflicted with multiple sclerosis at the time and had been since 1926 or 1927, Doctor Jacobsen?

Mr. Jarvis: I make the same objection, Your Honor.

The Court: Objection will be overruled, exception allowed.

Q. Doctor, in your opinion what was the cause of Fred I. Babbitt's death? A. He died——

Mr. Jarvis: Could my objection go to all this?

The Court: Oh it does, certainly.

Mr. Jarvis: Without repeating it.

A. (Continuing) In my opinion he died from an infarction of the lungs and infarction of the pons, as a complication to a fractured femur, directly due to the fractured femur.

Q. Well, Doctor, in your opinion as a medical expert, can or may a fractured femur result from a fall?

A. A fractured femur may result from a fall. That is the common cause of a fractured femur.

Q. Doctor, in your opinion, would Fred I. Babbitt, considering now his history and the case records, die from the fractured femur and infarction, even if he had not been [217] afflicted with multiple sclerosis? Now don't answer until counsel has an opportunity to object.

Mr. Jarvis: Your Honor, this witness did not see Mr. Babbitt during his lifetime at all. The question is a hypothetical question. It is not based on the evidence in this case, and does not purport to contain all the elements that are before the Court and the jury in this case.

The Court: I think I shall sustain the objection to its form.

Q. Doctor, assume an individual of the age of 70 years; assume also that that individual is afflicted with multiple sclerosis and has been for fourteen or fifteen years. Assume further that that individual suffered a fall from which he sustained a fractured femur. Assume further, Doctor, that the fracture was reduced, the leg placed in a well splint, and for a period of time the man seemed to make satisfactory progress; assume that a week later he lapsed into a coma from which he never regained consciousness, and that he died approximately ten days later. Are you able to form an opinion, Doctor, as to whether the multiple sclerosis with which he had been afflicted, was a contributing cause of death?

Mr. Jarvis: Your Honor——

The Court: Answer "yes" or "No." [248]

A. Yes, sir, I think I can.

Mr. Jarvis: Just a minute, Doctor. I make the same objection that the question does not

cover, nor does it purport to cover all of the evidence, or the record in this case. I refer especially to Doctor Palmer's testimony in cross-examination.

Mr. Savage: I believe, Your Honor, the question fairly covers all the elements of the case, insofar as they have been introduced by the plaintiff, and also by the plaintiff's witnesses.

The Court: Perhaps that question should be broad enough to include all the elements set forth, whether they are accepted or not, in this autopsy report.

Mr. Savage: I am willing to do that.

Q. (Continuing): Assume also, that the autopsy report showed the following facts, that the body was one of a fairly well developed and well nourished white male. Skin generally is clear and free from eruption. The chest is symmetrical, the abdomen is on level with the chest. There is a slight discoloration over the left foot and the left leg and foot is everted.

When the body is opened the peritoneum is smooth and glistening and the intestines are of uniform caliber. The liver is at the usual position and the stomach is not distended. The spleen lies free. The [219] kidneys are small and when examined the capsules strip with difficulty leaving a markedly scarred contracted surface beneath. There is a marked diminution of the cortex of the kidney. When the chest is opened the lungs fail to meet in the midline. Both lungs are free and the lower lobe of the left lung shows some areas of consolidation. The lower lobe of the right lung show a large hemorrhagic infarct. When the heart is opened it is found filled with fluid and clotted blood. There are no valvular

changes. The coronary arteries are patent throughout. There is a marked sclerosis of the arch of the aorta with atheromatous plaques. The cut surface of the spleen show an intact capsule with an increase of the fibrous tissue.

When the calvarium is removed the dura stands high above the brain, due to fluid beneath. The pia-arachnoids show diffuse scarring with considerable fluid beneath. There is a diffuse whitish gray thickening of most of pia-arachnoid. When the brain is opened the ventricles are patent. The left ventricle appears slightly dilated in relation to the right. Sections of the cortex and the basal nuclei of the brain shows no abnormal changes. Sections of the brain stem and pons overlying the ventricles show an area of necrosis with a hemorrhagic coloring. This necrosis and coloring extends [250] for a distance of 1.5 cm and ends about the medulla, this is most marked on the left half though it has crossed the midline in some areas of the pons. The arteries of the basal vessels are markedly thickened and show many areas of sclerosis. The cerebellum show no noteworthy changes. The base of the skull is intact. There is no evidence of fracture in any portion of the skull. There is no evidence of gross hemorrhage.

Anatomic diagnosis: 1. Fracture of the left femur. 2. Hemorrhagic infarct of both lungs. Extensive infarction of the pons overlying the ventricles with areas of necrosis and slight hemorrhage. 4. Marked edema of the brain. 5. Marked arterio sclerotic nephritis.

Doctor, assuming what I have read to you in addition to the history which I gave you, and the records of the Seattle General Hospital which

have been admitted here in evidence, are you able to form an opinion as to whether Fred I. Babbitt would have died from a fracture of the left femur, even if he had not been afflicted with multiple sclerosis?

Mr. Jarvis: Your Honor, I make—oh, he can answer yes or no.

A. Yes, I think I can.

Q. And Doctor, what is that opinion? [251]

Mr. Jarvis: Your Honor, I make the same objection, that the question does not cover the records in this case as established, nor the evidence that is in, and I make the objection to the form of the question.

The Court: I think the question should perhaps be framed slightly different—not limited to multiple sclerosis, but multiple sclerosis and the other conditions *that have been disclosed by the report that you just read, and the hospital records and I assume that was your intent to ask the question.*

Mr. Savage: It was. May I modify it in the language that Your Honor has used?

Q. Now Doctor, are you able to form an opinion as to whether he would have died from the complications of a left—or a fracture of the left femur, even though he had not—even though he had not afflicted with multiple sclerosis, or complications which might arise, dependent thereon?

A. Yes, sir, I think I can.

Q. Now, Doctor, what is your opinion in that respect?

Mr. Jarvis: I make the same objection.

The Court: Same ruling, and an exception allowed.

A. *I think Mr. Babbitt from the direct complication of his injury, I believe that his multiple sclerosis had nothing [252] at all to do with his death.*

Mr. Savage: Cross examine. (Tr. 105-111)

The serious objections to Dr. Jacobson's testimony are palpable and apparent. He never saw the insured or his body. His testimony and opinions were based on a conversation with Dr. Palmer, one of the insured's physicians and an examination of unspecified and undesignated hospital records, reading *part* of the autopsy report and hearing *some* of it discussed in the court room. This testimony was given practically at the close of plaintiff's case. The Doctor's testimony was based on conversations and opinions of another Doctor had and made out side of the court room, an examination of improperly admitted and unspecified hospital records, no part of which were read, and hearing some of the testimony in regard to the autopsy discussed in the court room. As a matter of fact, the Court (Tr. 106) in assisting counsel to frame his hypothetical question stated he did not know the contents of the hospital record. This question (Tr. 106) which was finally answered over objection did not purport to cover any circumstances regarding the fall, the duration of the hospitalization, the age and physical condition of Mr. Babbitt as disclosed by the autopsy and the hospital records and many, many other elements and facts upon which a hypothetical question should be based. In *U. S. v. Stephens, supra*, a hypothetical question was asked in a war risk insurance case where the facts were no more voluminous

than in the *Babbitt* case and yet the hypothetical question in that case covered three pages in the Federal Reporter System and was deemed insufficient by this Court. Dr. Jacobson not having any personal knowledge of the subject matter could only testify as to his opinions, and his opinion on this case (Tr. 103-106 inc.) was elicited without taking into consideration the essential elements then in evidence; moreover, it was based on only part of them, on hearing some of them discussed in the court room and conversations and opinions of another expert outside of the court room. This first hypothetical question which was answered (Tr. 106) comes squarely within the following general language and cases:

“* * * but a mixture of unspecified knowledge and what the witness has heard of testimony, or facts partly within his observation or knowledge and partly derived from others, or of facts in evidence and also the custom of a business does not constitute a suitable hypothesis.” 32 C.J.S. 362.

“A witness who has not heard all the material testimony cannot testify from what he has heard, from what he has seen and heard, or from what he has heard and a newspaper account of the evidence at a former trial of the same case which he has read, and evidence elicited by these forms of question has accordingly been rejected, even where the evidence of a witness is incorporated with facts hypothetically stated.” 32 C.J.S. 364.

The Courts of this country have consistently held that an expert may give his opinion on facts assumed to have been established, but it is against every rule and principle of evidence to allow him to state his

opinion upon the conclusions and inferences of other witnesses. *Williams v. State* (1885) 64 Md. 384, 1 A. 887; *Mt. Royal Cab Co. v. Dolan* (Md.) 179 A. 54, 98 A.L.R. 1106.

In *Levine v. Barry, supra*, the Washington Supreme Court stated:

"We think it should at once be conceded that the proper rule is that hypothetical questions *propounded on direct examination* should be based upon the testimony in the case. *But cross-examination should not be so limited.*"

This is followed by *Jones v. McQuesten, supra*, where the Court stated:

"We recognize the rule that a hypothetical question *propounded upon direct examination* should be based upon the testimony of the case."

Also *Seibert v. Ritchie*, 173 Wash. 33, 21 P.(2d) 272, and Judge Simpson's dissenting opinion in *Newton v. Pacific Hwy. Trans. Co., supra*:

"The testimony of experts based upon hypothetical questions cannot create an issue. * * * In this connection it is proper to note that hypothetical questions must be based upon the evidence in the case, not upon suppositions."

These principles written by Judge Simpson in his dissenting opinion were general principles of law sustaining his dissenting opinion, and were not questions of law otherwise decided or ruled upon in the majority opinion. The question is succinctly illustrated in *Howarth v. Adams Express Co.* (Pa.) 112 Atl. 536, where the Pennsylvania Supreme Court stated:

"The question should have been excluded. An expert may express an opinion on an assumed

statement of facts which the evidence intends to establish, *but not on what someone told him nor on what he learned from another doctor*, nor from the history of the case we know not what nor by whom communicated. An opinion based on such a question would naturally be misleading. The answer is also bad for it does not show what had been given the witness as the history of the case nor assume the truth of the evidence to which he had listened. * * * In such a case an expert opinion cannot be based upon facts not before the jury (Rogers on Expert Testimony, 2d ed., P. 82), nor on hearsay (Lawson on Expert Testimony, 2d. ed., P. 266)."

This statement squarely applies to the case before this Court. Dr. Jacobson's testimony was admittedly based on what someone told him, admittedly based on what he learned from another doctor, admittedly based on an unknown, unmarked number of hospital records. His opinion was palpably based upon facts not before the jury. Without going into detail the following synopsis of cases illustrate our position:

In *Chicago v. Chicago Rwy. Co.* (Ill.) 134 N.E. 44, the court stated in substance that if the testimony of an expert witness is based in a material degree upon elements which cannot legally be considered without separating those from the ones which may be legally considered, the opinion is incompetent.

In *Fraser v. City of Geneva*, 203 Ill. App. 566, the court stated that the testimony of a physician giving his opinion as to the cause of death based in part upon what he was told by another party, *but not stating*

what such other party told him, held improperly admitted in an action to recover damages for such death.

In *Wigginton v. Wigginton's Ex'r.* (Ky.) 266 S.W. 245, the court emphatically laid down the rule that expert opinion must be based upon and relate to facts proved in case.

In *Illinois Cent. R. Co. v. Townsend* (Ky.) 267 S.W. 61, the same court stated that expert testimony of a physician consisting entirely of his opinion derived from statements of plaintiffs during examination made for purpose of testifying, is incompetent.

In *Cardinale v. Kemp*, (Mo.) 247 S.W. 437, the Missouri court also stated that expert testimony must be predicated on facts and conditions conceded to be true or existing or assumed to be established by other testimony, thus excluding the possibility of basing one opinion on another opinion.

In *Croizer v. Minneapolis Street R. Co.* (Minn.) 18 N.W. 256, the court held that where the opinion is supposed to be based upon the evidence in the case as heard by the witness it is rendered inadmissible by matters learned out of court.

In the recent case of *Southern National Insurance Co. v. Hoggie* (Ark.) 174 S.W.(2d) 934, the court stated that in an action on a life policy, physicians testimony as to insured's health based entirely on view of the record of insured's at a sanitarium and a diagnosis of another physician, was properly excluded.

Counsel for plaintiff then attempted to enlarge on the hypothetical question which, of course, could not cure the previous error. This started out (Tr. 107) as

a hypothetical question based on certain assumptions and based on a reading of the autopsy report but did not purport to cover any part of the hospital records, Dr. Rex Palmer's Certificate of Cause of Death (Df Ex. A-2), nor many of the other material elements in the case. After asking three or four questions the one that was finally answered was modified by the Court to be based upon the autopsy report and the hospital records without further specifying or enlarging on them, and the Doctor was then asked if the insured would have died even though he had not been afflicted with multiple sclerosis. From any point of view the question is palpably objectionable for the reasons stated. As a matter of fact, the assumption is not correct because the evidence showed that the insured was suffering from disease, defect and bodily infirmity. The question did not purport to come within the terms of the policy nor to cover the evidence in the case.

Specification of Error 5

5. The Court committed errors of law during the trial in addition to those hereinabove specified by

(a) Failing to direct the jury to bring in a verdict for the defendant at the conclusion of the plaintiff's testimony.

(b) By overruling defendant's alternative motion for judgment notwithstanding the verdict or for new trial.

(c) By entering judgment for the plaintiff.

All of the points raised here are covered by the foregoing argument.

We respectfully believe that there was error in the trial of this cause as argued herein and that it should be remanded with directions to dismiss this action, or if refused, that a new trial be granted.

Respectfully submitted,

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and

JAMES G. MULROY,

Attorneys for Appellant.

No. 11311

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAILWAY MAIL ASSOCIATION, a corporation,
Appellant,

vs.

JENNIE M. BABBITT, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

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FILED

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BRIEF OF APPELLEE

**STATEMENT OF PLEADINGS AND FACTS DISCLOS-
ING JURISDICTION OF THE DISTRICT COURT
AND THIS COURT**

Jennie M. Babbitt, as plaintiff, filed in the Superior Court of the State of Washington for King County, a complaint against Railway Mail Association (Tr. 2). Alleging diversity of citizenship and that the amount involved was more than \$3000, the defendant, Railway Mail Association filed in the Superior Court of the State of Washington for King County, its petition for removal, and pursuant to such petition the cause was removed to the United States District Court for the Western District of Washington, Northern Division (R. 6, R. 9). The juris-

diction of the District Court was based on 28 U.S.C.A. 71 and 72. The cause was tried before a jury which returned a verdict in favor of the plaintiff and judgment was entered in favor of the plaintiff and against the defendant pursuant to said verdict. Appeal was taken to this Court which has jurisdiction upon appeal to review such judgment. 28 U.S.C.A. 255.

INTRODUCTION

The Rules of the United States Circuit Court of Appeals for the Ninth Circuit, 20, p.2(c) provide: The appellant's brief should contain a concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised. The appellant's purported statement of facts does violence to this rule. Rather than being a concise statement of the case, presenting the questions involved and the manner in which they were raised, it is a singular jumble of fact, argument and fiction. It is replete with excursions outside the record, flights of fancy, contradictions, and at times it even descends to pettiness. Straw men are set up and demolished with gusto; pleadings which were stricken are resurrected and made the basis of so-called judicial admissions; evidence, which is in one breath denounced as incompetent, is later solemnly advanced as proof of the appellant's contentions. New specifications, previously undesignated, spring forth in full panoply arrayed. Specifications 2, 3, 4 and 5 are not set out in the Statement of Points upon which the appellant relies. Since such specifications were not designated for

inclusion in the record on appeal, and since the appellant did not designate the complete record and all proceedings and evidence in the action, the purpose of Rule 75(d) Rules of Civil Procedure—assurance that the matter brought up in the record on appeal is adequate to protect the interests of the appellee, was circumvented. *Keeley v. Mutual Life Insurance Co. of New York*, 113 F.2d 633. Without the gift of prophecy the appellee could not anticipate with any degree of accuracy what new issue might be raised and so insist upon inclusion of matters which would enable the appellate court to determine the question with understanding.

STATEMENT OF THE CASE

Jennie M. Babbitt, the surviving spouse of Fred I. Babbitt, instituted an action against the Railway Mail Corporation to recover the sum of \$4000.00 due her as the beneficiary of an accident insurance policy issued to her husband by the defendant corporation. The beneficiary certificate provided that if the named member should suffer death during the continuance of the certificate through external, violent and accidental means not the results of his own vicious, intemperate or unlawful conduct, the Association should pay to the wife \$4000.00. There was to be no liability when disease, defects or bodily injury was a cause of death (R. 3, 12). Death within the meaning of the certificate was pleaded.

The defendant admitted the issuance, for a valuable consideration: of a beneficiary certificate to Fred I.

Babbitt on February 1st, 1924 (R. 10). The defendant further admitted that the insured paid regularly all the dues and assessments to the time of his death and that he was a member in good standing (R. 35, 51, 96, 125). The affirmative defense—the only one relied upon—pleaded that death was not the sole result of accidental means alone, that disease, defects or bodily infirmity was the cause or a contributing cause (R. 14).

The plaintiff offered evidence to prove that on July 9th, 1943, the insured, who had been retired for years from active service because of multiple sclerosis, suffered an accidental fall in the act of dressing when a loose corner of a small scatter rug upon which he was standing slipped out from under his feet as he twisted his body (R. 53, 54, 92); that the accidental fall caused a fracture of the left femur; that a fat embolus was thrown into the blood stream from the fractured bone; that the embolus was circulated to the lungs and brain and so caused death (R. 77, 78, 79, 99, 100, 107, 109, 110, 111, 119, 120, 121, 122) and further that no disease or bodily defect was a contributing cause (R. 77, 79, 111).

The defendant sought to prove that disease or bodily defect, multiple sclerosis, or transverse myelitis, or arteriosclerosis, was a contributing cause of death.

The jury returned a verdict in the plaintiff's favor; an alternative motion for judgment or new trial was denied; a judgment entered upon the verdict and thereafter this appeal taken (R. 18, 19, 20).

Prior to the institution of the action, the plaintiff, as was required by the constitution and by-laws of the Association, filed her proof of claim upon the forms of the defendant. Her claim was disallowed by the Committee of Claims. An appeal was taken to the National Executive Committee and on October 21, 1943, her appeal was denied (R. 5, 6, 11, 94, 95).

ARGUMENT

Specification 1

Much ado is made over the trial court's allowing amendments to be made to the complaint just as the trial started. A complete answer to the argument is contained in the language of the Rules of Civil Procedure which are designed to cover situations of the kind which arose here and which constantly come up in law suits. Rule 15(a) states, "otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; *and leave shall be freely given when justice so requires.*" Rule 15(b) goes so far as to say, "the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action shall be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

Briefly, and simply, the complaint was amended

by striking paragraphs IV and VI (R. 46, 47); and then the cause proceeded as a law action to be decided by a jury. With the greatest consideration, the trial court asked the appellant's counsel if they would be handicapped or prejudiced in going to trial on the amended complaint (R. 42, 47, 48). After all of the preliminary discussion and the allowance of the amendments the trial judge stated, "And I want to offer to the defendant again, the opportunity, if he sees fit to do so to claim surprise by reason of a narrowing of the issues." Mr. Jarvis replied, "Well, I will say this your Honor, that we are not surprised * * *." "I will say, your Honor, we are ready to try this case—perfectly ready to try it * * *." "I do not believe that there is a great deal that would justify us in asking, your Honor, conscientiously asking, your Honor, for a continuance" (R. 47, 48).

After having had so declared himself, we are now confronted with a complete reversal of attitude. Grievance and injury are affected because no new written complaint was filed (none was requested); because the amendments were oral, as if the granting of a trial amendment of necessity called for the filing of a new written pleading. It must be remembered that nothing new was added; that there was merely a taking away, a shortening and simplifying of the complaint by striking therefrom bodily two paragraphs. The proceedings were clear at the time and still are. In his instructions to the jury, the Court was careful to define and limit the plaintiff's cause of action as amended. No one could have been mislead or preju-

diced, except defense counsel, and then only for the purpose of appeal.

Typical of the appellant's attitude is the contention, which now rears its head for the first time, that the defendant (plaintiff) was not a member of the Railway Mail Service at the time of his accident and death within the meaning of the constitution and by-laws of the organization because he was no longer working in the Railway Mail Service. If this argument is not advanced with tongue in cheek, many large portions of the record have been forgotten.

The defendant's answer admits the allegations of Paragraph V of the plaintiff's complaint—that the insured did pay to the defendant all the regular monthly dues and special assessments from July 31, 1928, until the date of his death on July 30, 1943 (R. 10).

The affirmative defenses nowhere plead that the insured was no longer eligible to the benefits of his certificate by reason of his retirement from active service (R. 12, 13 and 14).

The trial court was concerned about this phase of the case, and asked defense counsel if the permanent retirement of the insured, if the information had been passed on to the insurer, the defendant, severed the plaintiff automatically under the terms of the contract. In order to make assurance doubly sure the question was asked twice. Mr. Jarvis, who handled the whole trial for the defendant, answered, "No, sir, it did not" (R. 34, 35). That was a real judicial admis-

sion made in open court by the defendant's counsel and therefore binding upon it. Moreover, it settled that particular question so that it was not an issue in the trial. Without doubt all parties so understood it, and the court's conviction respecting the matter is established by an instruction as follows:

"The defendant—that is, the Railway Mail Association, admits that there was such a certificate and that it was in full force and effect on July the 30, 1943, date when Fred I. Babbitt died." (R. 127)

To that instruction no exception was taken.

Mr. Guernsey K. Chaplin, president of the local branch of the Railway Mail Association and by virtue of his office, a member of the Association's National Board, testified there was no reduction of the insured's dues and assessments by reason of his retirement, and that he was a full member (R. 96). To the same effect is the testimony of Herbert J. Matthews, the local financial secretary, the man who collected the dues and assessments (R. 125). The claim was considered and decided by the National organization as being one of a member in good standing, and was rejected solely on the ground that death was not occasioned by accident alone. Obviously the appellant's local officers, its National Board and its trial counsel, all considered Mr. Babbitt a member in good standing until after the jury verdict. Then came this afterthought, newly-born, in time for appeal.

Conceding, *arguendo*, that the question is properly before this court, we point out that the language

of the constitution states that the insurance benefits were not available to persons who had resigned, been removed or transferred from the Railway Mail Association. The language being that of the insurer, undoubtedly framed for its protection, must be strictly construed against the Association. Nowhere is there any provision stating that *retirement* called for severance from the benefits of the organization. There is no need to point out to any judge the distinction between resignation and retirement. Mr. Babbitt never resigned, was never removed, was never transferred from the Railway Mail Association. He retired solely because of ill health. At the time no one knew how long his disability would endure. In the event of recovery he would have undoubtedly, resumed his former calling.

Still other authority must resolve this question in the plaintiff's favor. For at least twelve years the defendant company accepted the regular dues and special assessments from the insured in full amount and on the basis of full membership with all its attendant rights, benefits and obligations, with full knowledge of his physical condition and disability. The cases are uniform in holding that even if a disability is sufficient to effect a forfeiture, collection and retention of the dues waive the right to declare forfeiture. *McDonell v. Local Union No. 81*, 111 Wash. 147; *Ware v. Grand Lodge Bro. of R.R. Trainmen*, 152 Wash. 78. An insurer who with knowledge of facts entitling it to treat as a policy as no longer in force receives and accepts a premium on the policy

is estopped to take advantage of the forfeiture. 29 Amer. Jurisprudence, Par. 857 and 863.

In addition to all the above, it may be noted, in passing, that Rule 12(h) of the Rules of Civil Procedure provides that a party waives all defenses which he does not present either by motion or in his answer—with certain exceptions. The matter for which the defendant is now contending was not set out as a defense either by motion or in any of his pleadings.

The appellant leans on a very slender reed in his argument based upon the plaintiff's reply. In the first place the reply was stricken on his motion (R. 24); now he seeks to base a so-called judicial admission upon the very pleading he had succeeded in eliminating. It is elementary that a stricken pleading cannot, without anything further, be considered a judicial admission. However, there could be no possible prejudice. The plaintiff at all times admitted and testified that the insured had been afflicted with multiple sclerosis to the extent of being unable to perform his duties as Railway mail clerk. And as was pointed out by the trial judge (R. 38) there was no admission in the reply that disease or bodily infirmity was a contributing cause of death, but only a statement that the defendant association was obligated to pay on the beneficiary certificate even though disease or defect *might* have been a contributing cause of death.

Specification 2

A considerable portion of the argument respecting the jury trial is based on a false premise. Time and

again the appellant states that the demand for jury trial was stricken and that Judge Black ordered that a jury be impaneled to act in an advisory capacity only (Brief 14, 18). We say there was no such order. On the contrary Judge Black impaneled a jury to hear such issues of fact as might arise in the trial and as the Court might direct to be decided by the jury *and* to act in an advisory capacity in connection with such issues of fact as the court *might* refer to them for that purpose.

If Judge Black had presided at the trial, even under the language of this order, he could have submitted the issues of fact for the jury's sole determination. The power and authority of Judge Leavy could not have been less than that of Judge Black who assigned the case to Judge Leavy for trial.

However, counsel has confused two principles or rules—that of jury trial of right and jury trial by permission in the exercise of discretion. Conceding for the sake of argument that we had no right to demand a jury trial because of failure to demand within the time fixed, yet it is as clear as a church by daylight that Rule 39(b) of the Civil Rules of Practice says, notwithstanding the failure of a party to demand a jury in an action in which such demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues. The trial judge so held (R. 45, 46).

Specification 3

What the appellant seeks to make a question of law was a question of fact for the jury's exclusive

decision. Was the death of the insured caused by accident, resulting directly and independently and exclusively of any other cause, without disease, defect or bodily infirmity being a contributing cause (R. 54, 81). With respect to the question of accident, we have the uncontradicted testimony of Mrs. Babbitt that the insured slipped and fell heavily to the floor as the result of a loose corner of a rug sliding as he turned or twisted his body to put on long underwear (R. 54, 81). But the testimony of an eye-witness is not necessary to establish accidental death. As this court has said in *United States F. & G. v. Blum*, 270 Fed. 947, accidental death can be established by circumstantial evidence. Accidental slips and falls in the home on stairways, in bathtubs, on polished floors and loose rugs are so common that insurance companies in their advertising are literally holding up stop and look signs, warning of potential dangers.

The appellee's discussion of voluntary and involuntary action, and the distinction between them, is too nebulous to grasp. Without doubt, every accident is preceded by some voluntary action. One must tread stairs before he can slip thereon. One must subject himself to a bath before there can be a skid in the tub. One must voluntarily step on a rug before it can slip out from under him. Speculation as to what might have caused the fall may be an interesting mental exercise; but it is idle because the jury found on competent, substantial testimony, which they undoubtedly believed, that it was occasioned by an accident.

There can be no doubt that the fall caused a fractured femur and that, in turn, an embolus, naturally, proximately and without the intervention of any independent cause; that such embolus got into the blood stream, was circulated to the lungs and to the brain and caused death. The attending physician, who reduced the fracture, who attended the insured regularly in the hospital, the family doctor for years, testified positively that the fall caused the fracture, the fracture caused the embolus, and the embolus resulted in death (R. 76, 77, 78). Transverse myelitis was in no sense a contributing factor (R. 99, 100). To the same effect was the testimony of Dr. Conrad Jacobsen, an expert called by the plaintiff (R. 106, 107, 111).

But in addition to these two medical men we have the testimony of the defendant's own doctor, Alfred Balle, and the autopsy report signed by him. This evidence alone is sufficient to justify submission of the case to the jury. The autopsy report (Defendant's Exhibit A-1) reads in part—"Anatomic diagnosis: 1. Fracture of the left femur. 2. Hemorrhagic infarct of both lungs. Extensive infraction of the pons overlying the ventricles with areas of necrosis and slight hemorrhage. 3. Generalized marked arterial sclerosis. 4. Marked edema of the brain. 5. Marked arterio sclerotic nephritis." On cross-examination the defendant's expert testified: The hemorrhagic infract of both lungs was extensive enough so that it could have caused death (R. 119); embolus in the blood stream which lodged in the lungs could have caused this in-

farct; there was an extensive infarction of the pons overlying the ventricles with areas of necrosis and slight hemorrhage; extensive infarction was sufficient to cause death; the extensive infarction of the pons could have been caused by an embolus (R. 120). A fracture of a bone is the most common cause of fat embolus. Fracture of a bone could result in an embolus. A fat embolus may go to the lungs and to the brain. When an embolus of sufficient size goes to the lungs or the brain or both, it will result in death by reason of an infarct (R. 122).

There is not a shred of testimony, even from the appellant's own expert that multiple sclerosis, or transverse myelitis or any other disease contributed to the insured's death.

The appellant adopts the position that one must be free from any bodily defect or disease before he can recover for accidental death. He can find no support in reason or authority. Although our own state books are richly studded with decisions exactly in point, counsel has not seen fit to refer to or quote from any of them. Perhaps the leading case in this Circuit is *Order of Commercial Travelers v. Groves*, 130 F.2d 863, a case from our own district, and one which is undoubtedly decisive of this cause. Upon that decision and the authorities cited therein, we can rest our case because the two are nearly identical.

The *Groves* case cites *Hill v. Great Northern Life Insurance Co.*, 186 Wash. 617. There the insured fell dead shortly after an automobile accident. The de-

fendant company argued that death was caused or contributed to by a pre-existing coronary condition. Shortly before, the insured had been examined by a physician who found that he was suffering from low blood pressure, probable coronary pathology, a peptic ulcer and a definite mitral heart murmur. An instruction that the question whether the death was due solely to accident was for the jury to determine and a verdict for the plaintiff was upheld. To the same effect are *Pierce v. Pacific M.L. Ins. of Cal.*, 7 Wn.(2d) 151, where the insured had previously suffered a stroke of apoplexy; *Kane v. Order of Commercial Travelers*, 3 Wn.(2d) 355, in which case under an accident insurance certificate the question whether death from pneumonia was an accidental one upon a showing that the insured had been injured from an accidental fall which aggravated an existing hernia and necessitated a surgical operation at which time he contracted pneumonia, causing his death, was properly submitted to a jury, their finding in favor of the plaintiff was upheld.

Our courts, in harmony the overwhelming weight of authority, have held that a sick man may suffer an accident, which but for his sickness might not have befallen him; and if the disease, while existing, be but a condition and the accident the moving and proximate cause of death, the exception in the policy will not relieve the insurer. *United States F. & G. v. Blum*, 270 Fed. 947; *Flyzik v. Travelers Insurance Co.*, 20 Wn.(2d) 35; *Lynch v. Northern Life*, 22 Wn.(2d) 913.

A very interesting and instructive decision was written by former Chief Justice Taft while he was still on the bench of the Circuit Court of Appeals in the *Manufacturers Accident Indemnity Co. v. Dorgan*, 58 Fed. 945. This opinion was later quoted with approval by the Washington state court. The insured, while on a fishing trip early one morning experienced difficulty with his throat and chest. Shortly after he went out to fish, he was discovered lying in a brook, face downward and submerged in six inches of water, dead, with bruise on his forehead, yellowish froth about his mouth, face purple and tongue inflamed. The autopsy showed heart, brain and other vital organs in normal and healthy condition. Insurer introduced evidence tending to show D had suffered from defective action of the heart at its aortic valve; also, some evidence tending to show D had suffered from dizziness caused by defective action of the heart.

The policy contained a provision to the effect that it would not cover accidental injuries or death resulting from or caused, directly or indirectly wholly or in part, by or in consequence of vertigo or any disease existing prior or subsequent to the date of the certificate.

The court held that the burden of proving accidental death was upon the plaintiff. The circumstances surrounding his death were consistent with the theory that the deceased had slipped and fallen in such a way as to strike his head against a rock, in which helpless state, suffocation by drowning followed:

“It is well settled that an involuntary death by

drowning is a death by external, violent and accidental means. In the legal sense, and within the meaning of the terms of the policy, if one suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or slipping, the drowning in such a case would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be the condition; the drowning would be the moving, sole and proximate cause."

Specification 4

The appellant's brief presents an amazing volte face respecting appellee's Ex. 4. Moreover, there are lapses into oblivion difficult of comprehension. The burden of the appellant's plea is that the hospital records were under Washington law, incompetent and inadmissible, quoting from *Toole v. Franklin*, 158 Wash. 696, as authority. He failed to mention a later Washington case, *Murgatroyd v. Dudley*, 184 Wash. 222, which held that hospital records kept in the ordinary course of the hospital's business came within the exception of the hearsay rule and were properly admissible. There, as in this case, the hospital records were identified by the manager of the hospital who testified, as here, that they constituted all of the records of the decedent's case and that they were kept in the usual and record course of the hospital business. *Murgatroyd v. Dudley* had been pointed out to the defendant below in a brief written by the plaintiff and the trial court had dwelt on it at length in its

memorandum opinion denying a new trial. See also the note in 120 A.L.R. 1124.

On page 4 of his brief the appellant quotes language from the appellee's Ex. 4 as competent evidence in support of his contention that the insured suffered paralysis of his right leg. He does the same thing on pages 9 and 26. Can the appellant urge incompetent matter in support of his argument? But on page 29, Janus-like, the appellant looks in the opposite direction and declares the very exhibit which he cited to suit his purpose, is incompetent and therefore inadmissible. What then? Is the exhibit gospel when the appellant desires its use to support his contention and anathema when the appellee urges its proper admissibility? Will the appellant take one position or the other? He cannot cling to both horns of his dilemma.

On page 30 the court is told that the exhibit was a folder containing a collection of papers of which the defendant did not know the number, the nature, or the source of these *purported* hospital records; that it was an unexplained and identified mass of technical and medical terms, phraseology and records. But when we turn to page 9 of the brief, mirabile dictu, the appellant describes Exhibit 4 as a "cardboard folder containing four X-ray pictures and at least ten other records which Mr. Frank Fells, the business manager of the Seattle General Hospital brought into court, describing as X-ray and clinical reports pertaining to the insured." As a matter of fact, Dr. Rex Palmer is

quoted verbatim from that exhibit. It would put too great a strain on credulity to believe that counsel was unfamiliar with their contents or their authorship especially when on page 39 of his brief, he declares the hospital records were prepared by Dr. Palmer or his son.

Complaint is made that there was no opportunity for examination (although obviously careful examination was made) and no opportunity to use the records for cross-examination. Of course, when the records were once marked for identification they were in the custody of the clerk for anyone's scrutiny.

Obviously the hospital records contained no new matter. There can be no dispute respecting the reason for hospitalization, a fractured femur, the treatment used, the history of Babbitt's stay, his sudden relapse or death, or of his previous affliction. The defendant's own doctor found a fracture, infarction of lungs and brain, arterio scleriosis, certainly death. In what conceivable manner could hospital records to the same effect operate to the defendant's prejudice?

Specification 4(b)

It is contended that prejudicial error was committed by admitting in evidence a photograph of the deceased taken some twelve years prior to his death (Ex. 5). This photograph had some relevancy as to the issues raised, since the undisputed evidence was that at the time it was taken and for at least five or six years prior thereto the deceased was suffering from the disease which the defendant contended was a con-

tributing cause of his death, and therefore it was properly admitted in evidence.

Specifications 4(c) and 5

It is believed that both specifications can be considered together. Dr. Don Palmer was the family physician, personally in charge and in attendance shortly after the accident until death resulted therefrom. Dr. Conrad Jacobsen testified as an expert.

Only a small portion of Dr. Palmer's testimony is quoted in the brief. But even in that small portion he testified, without objection or motion to strike, that assuming Babbitt was suffering from multiple sclerosis or transverse myelitis and had an accidental fall, with a fracture of a femur and a terminal death due to a fat embolus going to the lung and brain, in his opinion multiple sclerosis or transverse myelitis would not be a contributing cause of death (R. 77, 78).

Prejudicial error is claimed because Dr. Don Palmer was asked hypothetical questions which did not incorporate the evidence in the case and that he was asked for an ultimate conclusion which was for the jury's decision.

Dr. Palmer was asked, in great detail, respecting his personal knowledge and treatment of the deceased; and he knew that Babbitt had suffered and was suffering from multiple sclerosis. He did state without equivocation on direct examination (R. 77, 78), on cross-examination (R. 78, 79, 98, 99) and on redirect (R. 99, 100), that death was due to an em-

bolus going to the lungs and brain from a fractured femur.

Dr. Don Palmer was called by the plaintiff soon after Babbitt's fall. He ordered an ambulance to have the decedent taken to the hospital immediately, and there procured a room for him. He personally reduced the fracture, prescribed the course of treatment, visited the decedent in the hospital, gave consent to his departure, and then saw him when he fell into a coma as a result of an embolus. Dr. Palmer went into considerable detail, giving the symptoms of an embolus, and stated that it was his opinion that Fred Babbitt had died from a fat embolus, which had been caused by a fractured femur (R. 77, 79, 99). It would be difficult to conceive of a case with which a doctor was more closely connected, or about which he had more personal knowledge and information.

With respect to the testimony of Dr. Jacobson, hypothetical questions were put to him by the plaintiff's counsel, and upon the basis of the facts which had been established, he stated that in his opinion death was due to an embolus which had been caused by a fractured bone. The appellant urges prejudicial error because Dr. Jacobsen had seen the hospital records and had seen part of the defendant's Ex. A-1. Dr. Balle's autopsy report, and had conversed with Dr. Don Palmer.

Perhaps the easiest way to answer each and every argument made by the appellant on this point is to refer to the language of the leading case of *Hill v.*

Great Northern Life Insurance Company, 186 Wash. 167. The decedent fell dead shortly after an automobile accident. His representatives contended that death was caused, or at least contributed to, by a pre-existing coronary condition. Shortly before the decedent undertook his trip, he had been examined in the City of Seattle by a Doctor Standard, who found that he was suffering from low blood pressure, probable coronary pathology, a peptic ulcer, and a definite mitral heart murmur.

At the trial of the case the coroner, who assisted in performing the autopsy, was called to the stand. The facts concerning the decedent's death had been disclosed to him prior to the time that the autopsy was held. He was then asked what had caused the hemorrhage and he answered that he did not know. He was further asked if a shock caused by an automobile collision would cause it. His answer was, "It could cause it." The court could find no valid objection to the questions or to the answers, despite the fact that the witness had already discussed the decedent's condition as found by Dr. Standard.

The same witness was then asked what, in his opinion, caused the hemorrhage, and his answer was, "Probably form an accident."

Despite the fact that exception was taken to the question upon the ground that the witness did not have sufficient knowledge upon which to base an opinion, the court felt that it was under the circumstances proper, and the witness was competent to testify

thereto, he having been advised of the physical examination and the finding by Dr. Standard. The court went on to say. While the answer would probably not of itself be sufficient to sustain a verdict in the absence of more definite testimony, the jury was nevertheless entitled to consider it in connection with all the other evidence.

The court continued:

“The issues in this case were of such a nature that the jury was necessarily dependent upon medical testimony in determining the cause of death. The effects upon the human system of diseases and afflictions such as were portrayed in this case are not within the sphere of common knowledge. To arrive at an intelligent understanding and decision of such matters, the testimony of witnesses possessing special knowledge and skill is required. Both parties in the case at bar recognized that fact and all the testimony as to the producing cause of death came from physicians.”

It is obvious from even a most casual reading of this paragraph that the court could have been talking about the case of *Babbitt v. Railway Mail Association*.

The court continued:

“There are, generally, two classes of cases in which expert testimony as to the facts is admissible. In one class, the facts are to be stated by expert witnesses, but the conclusions therefrom are to be drawn by the jury. In the other class, the expert witnesses not only state the facts, but also give their conclusions in the

form of opinions, which the jury may either accept or reject. The first class comprises those instances where the existence of particular facts is not of common knowledge, but is peculiarly within the knowledge of men whose experience or study enables them to speak with authority. If, with such facts before it, the jury is able to form a conclusion therefrom, it is the sole province of a jury to do so. The other class comprises those cases where not only the knowledge of the facts, but also the conclusion to be drawn therefrom is dependent upon professional and scientific knowledge or skill. In such cases, qualified experts may testify both as to the facts and as to the conclusions.

“The case before us falls within the second classification. Mr. Hill’s physical condition at, and before, the time of the accident involved matters of medical diagnosis and required the medium of expert opinion, but just as important were the conclusions likewise required translation by expert knowledge.”

It should be noted that three physicians testified in the Hill case, that all three of them reviewed and considered all the facts included in Dr. Standard’s findings and in the report of the autopsy. We submit that there is no difference except in names, times and places between the Hill case and the Babbitt case. See also 32 C.J.S., §536.

In short, as stated by Amer. Jur. Vol. 20, par. 868, at page 732, opinions as to causation (death) may be based also upon what the witness had heard other witnesses testify to in the case, assuming that the

testimony so heard was true, or in part on examination or observation. There is, of course, no objection to the expression by a qualified physician of any opinion as to the cause of a death or of a particular physical condition, based upon wholly hypothetical questions, where the subject is one requiring superior learning or experience, and hypothetical questions fairly describe the condition of the person in question and reflect the testimony before the jury upon that point. Opinions of medical experts have been admitted also where based upon facts hypothetically stated, taken in connection with facts personally observed by the witnesses and fully detailed to the jury.

Reference is made also to *Helland v. Bridenstine*, 55 Wash. 471, in which the court said:

“A hypothetical question to a medical expert may embody the very fact ultimately to be found, where the inference from the facts proven involved a question of medical science on which the expert’s opinion was proper.”

Metsker v. Mutual Life Insurance Co.,
12 Wn.(2d) 618.

The defendant was amply protected by the court’s instructions with respect to expert testimony. On page 136 of the Record we find that the court charged: “An expert witness can only base an opinion on facts and records introduced in evidence, and any opinion which directly or indirectly is based upon facts or records not in evidence in the case, is not to be regarded by you.”

CONCLUSION

We have carefully examined the authorities cited by the appellant. Suffice it to say that they are not in point. First, because the facts are not comparable; second, because only portions of the principle are quoted; and, third, because some of them are in sharp conflict with the decisions of the Supreme Court of the State of Washington, which decisions are the law of the forum in this state. It is submitted that there was no error below and the case should be affirmed.

Respectfully submitted,

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No. 11320

United States
Circuit Court of Appeals
For the Ninth Circuit.

POPE & TALBOT, INC., a corporation,
Appellant,

vs.

GUERNSEY-WESTBROOK COMPANY,
a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

JUN 7 - 1946

PAUL P. O'BRIEN,
CLERK



No. 11320

United States
Circuit Court of Appeals
For the Ninth Circuit.

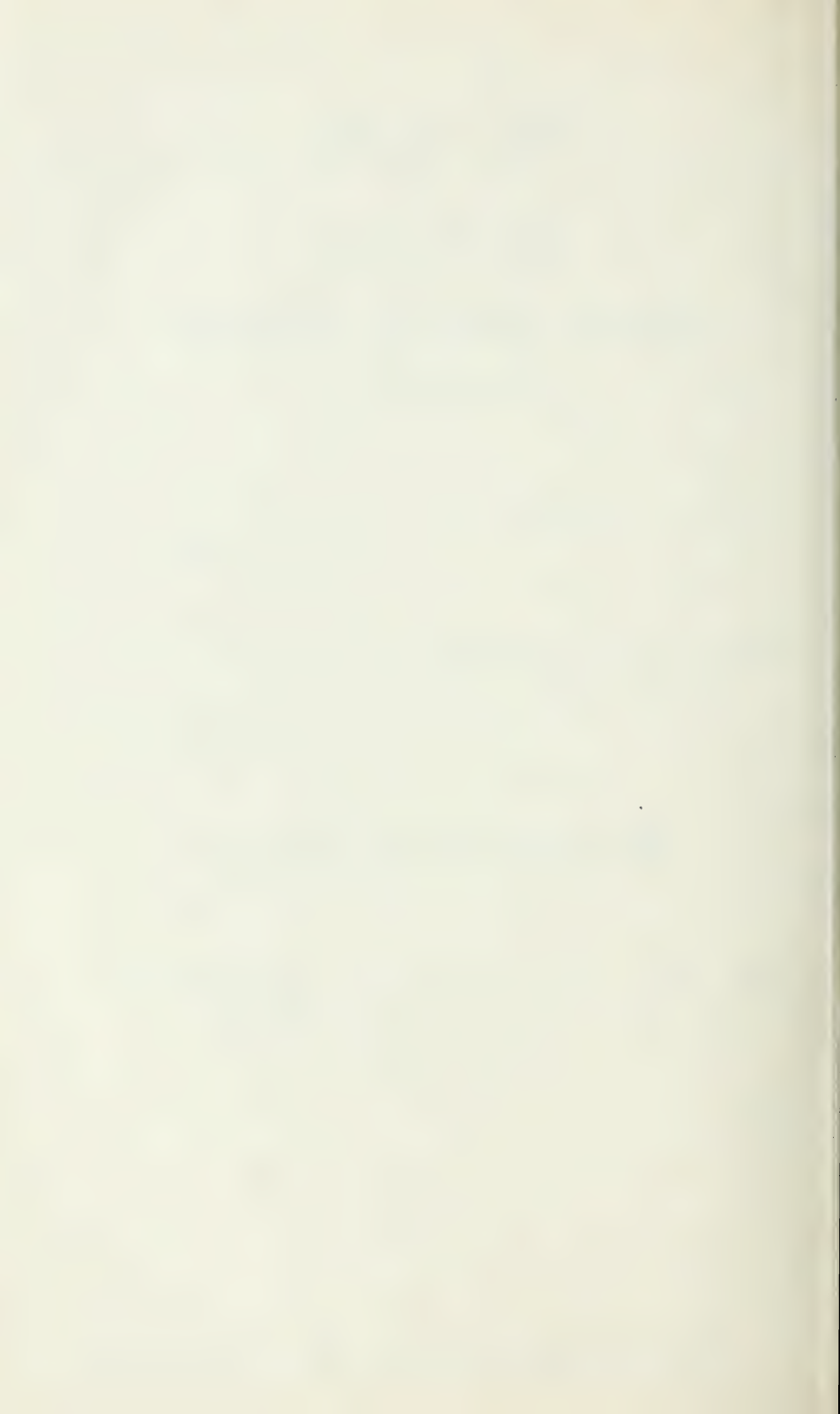
POPE & TALBOT, INC., a corporation,
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In the District Court of the United States for
the Northern District of California, Southern
Division

No. 23058-S

GUERNSEY-WESTBROOK COMPANY,
a corporation,

Plaintiff,

vs.

POPE & TALBOT, INC., a corporation,
Defendant.

COMPLAINT FOR MONEY WITHHELD

Plaintiff complains of defendant and for cause
of action alleges:

I.

Plaintiff was at all times herein mentioned, and
it now is, a corporation organized and existing under
and by virtue of the laws of the State of Connecticut.
Defendant was at all times herein mentioned, and
it now is, a corporation organized and existing under
and by virtue of the laws of the State of California.
This is a suit of a civil nature at common law where
the matter in controversy, inclusive of interest and
costs, exceeds the sum of \$3,000.00. [1*]

II.

Prior to December 13, 1941, plaintiff agreed to
buy from defendant and defendant agreed to sell to
plaintiff, a quantity of Douglas fir lumber, amount-

* Page numbering appearing at foot of page of original certified
Transcript of Record.

ing in all to approximately 664,991 feet net board measure to be shipped by steamer by defendant from St. Helens, Oregon, to Brooklyn, New York. By the terms of the said agreement of sale the purchase price of said lumber included the ocean freight, but the portion of said purchase price equivalent to the ocean freight on said lumber from St. Helens, Oregon, to Brooklyn, New York, was to be paid by plaintiff only on the arrival of the steamer at destination. The balance of the purchase price, less a discount of 2%, was to be paid on presentation of a sight draft with customary shipping documents attached, including a negotiable bill of lading to the order of Marine Midland Trust Company of New York.

III.

On or about December 13, 1941, defendant caused said lumber to be loaded on board its steamship *Absaroka*, and on said date defendant issued various bills of lading covering said shipment, wherein defendant was the shipper and whereby said lumber was consigned to the order of Marine Midland Trust Company of New York, notify the Guernsey-Westbrook Company at Hartford, Connecticut. In due course said bills of lading, with draft attached in an amount equivalent to 98% of the invoice price less the ocean freight, were presented to plaintiff at Hartford, Connecticut, and said drafts were paid by, and said bills of lading were delivered to, plaintiff. In and by said bills of lading the said lumber was to be transported by defendant on defendant's said steamship *Absaroka* from St. Helens, Oregon,

[2] unto the port of Brooklyn, N. Y., via the Panama Canal, and the freight on said lumber was to be collected at destination. On or about December 18, 1941, said Steamer Absaroka, with plaintiff's lumber on board, sailed from the said port of St. Helens, Oregon.

IV.

In the course of the voyage from St. Helens, Oregon, to Brooklyn, N. Y., and on December 24, 1941, when the vessel was in the vicinity of Point Fermin, California, the said Absaroka was struck by a torpedo presumably discharged by a Japanese submarine. The torpedo struck said vessel in the vicinity of No. 5 hold and tore a large hole in the shell of the ship. Said vessel was towed into the port of Los Angeles, California, and after the cargo remaining on board was unloaded, was placed in drydock for survey. Thereafter a contract for the repairs to the damage sustained by said vessel was entered into between defendant and Bethlehem Steel Company.

V.

On or about February 5, 1942, defendant notified plaintiff that it intended to, and did, abandon the voyage at Los Angeles, California. Plaintiff protested against said abandonment and advised defendant that plaintiff was willing to have its said lumber go forward on said Absaroka when the repairs to said vessel were completed, and plaintiff demanded that defendant carry plaintiff's lumber to destination. Defendant refused to do so and proposed to sell the entire lumber cargo of said vessel

at the port of Los Angeles, including plaintiff's said lumber. At said time it was difficult, if not impossible, to obtain space on other intercoastal vessels, and the cost of transporting said lumber by rail to destination would have been prohibitive. Defendant did not notify plaintiff [3] that it proposed to demand full freight to destination on said lumber until after the said voyage was abandoned. Plaintiff denied that any freight had been earned on said lumber. After considerable negotiation, in order to minimize damages, plaintiff consented to the sale of said lumber at Los Angeles, but without prejudice to its contention that the abandonment of said voyage was unjustified, and without prejudice to its contention that no freight was due.

VI.

The said cargo of lumber, including plaintiff's lumber, was ultimately sold by defendant at Los Angeles, California, for the account of the owners of said cargo, except for a quantity which was requisitioned by the United States Army and except for a part of the lumber which was damaged or lost as a result of the torpedoing.

On or about January 11, 1943, a part of the proceeds of the sale of plaintiff's lumber, less certain general average and salvage charges and other expenses, was tendered by defendant to plaintiff, but in tendering the said portion of the proceeds of the sale of plaintiff's lumber, despite the fact that under the terms of the contract of sale freight was not to be paid unless and until the vessel arrived at destina-

tion, and despite the non-performance of the contract of affreightment, defendant wrongfully withheld from plaintiff the sum of \$10,543.85, asserting that said sum was due for freight on said lumber.

VII.

At all times herein mentioned, plaintiff has denied, and does now deny, that any freight was earned by or due or payable to defendant and demanded payment of the freight withheld by defendant, but defendant failed and refused and still [4] fails and refuses to return said freight or any part thereof, and the whole amount of \$10,543.85 with interest from January 11, 1943, at 7% per annum, is now due and owing from defendant to plaintiff.

Wherefore, Plaintiff Prays Judgment against defendant for \$10,543.85, together with interest thereon at 7% per annum from January 11, 1943, until paid, for its costs of suit herein and for such other and further relief as may be appropriate in the premises.

FARNHAM P. GRIFFITHS,

McCUTCHEN, THOMAS, MATTHEW,

GRIFFITHS & GREENE,

Attorneys for Libellant.

[Endorsed]: Filed Dec. 23, 1943. [5]

[Title of District Court and Cause.]

ANSWER

Defendant, answering unto the allegations of the complaint herein, admits, denies and alleges as follows:

I.

Defendant has no information or belief with which to enable it to answer the allegations of the first sentence of paragraph I [6] of the complaint, and upon such ground denies each and all of said allegations. Admits the remaining allegations of said paragraph.

II.

Admits the allegations contained in the first and the last sentences of paragraph II of the complaint. Denies each and all of the remaining allegations of said paragraph, except that it admits that, by the terms of the said agreement of sale, the purchase price of said lumber included the ocean freight.

III.

Admits the allegations of paragraph III of the complaint.

IV.

Admits the allegations of paragraph IV of the complaint.

V.

Admits the allegations of the first sentence of paragraph V of the complaint. Admits that plaintiff protested the abandonment of the voyage. Denies that plaintiff advised defendant that plaintiff was

willing to have the lumber referred to in the complaint, or any of it, go forward on said Absaroka when the repairs to said vessel were completed, or at any time; denies that plaintiff demanded that defendant carry plaintiff's lumber, or any part thereof, to destination. Admits that defendant declined to carry said lumber to destination. Denies that defendant proposed to sell the entire lumber cargo of said vessel, or any part thereof, at the port of Los Angeles, or elsewhere, including plaintiff's said lumber, or any part thereof, and in this connection alleges that defendant advised plaintiff that said voyage was being terminated at San Pedro, California, pursuant to the provisions of the bill of lading; that plaintiff's lumber was being discharged from the vessel, and that the disposition of said lumber after such [7] discharge was subject to plaintiff's orders. In this connection defendant alleges that pursuant to the request of plaintiff and other shippers and owners of lumber carried on said vessel, it did sell, for the account of plaintiff and other shippers and owners of lumber that part of the lumber which was not lost but was discharged from the vessel at San Pedro, as aforesaid. Denies each and all of the remaining allegations of paragraph V of the complaint except that it admits that at the time referred to in paragraph V of the complaint it was difficult, if not impossible to obtain space on other intercoastal vessels. Denies that the cost of transporting said or any lumber by rail or otherwise to destination would have been prohibitive. Denies that defendant did not notify plaintiff

that it proposed to demand full freight to destination on said lumber until after the said voyage was abandoned. Admits the remaining allegations of said paragraph V of the complaint.

VI.

Admits the allegations of the first sentence of paragraph VI of the complaint. Denies each and all of the remaining allegations of paragraph VI of the complaint except that it admits that on or about January 11, 1943, a part of the proceeds of the sale of plaintiff's lumber, less certain general average and salvage charges and other expenses, was paid by defendant to plaintiff, and in this connection alleges that all moneys due from defendant to plaintiff were paid to plaintiff on or about January 11, 1943.

VII.

Defendant denies each and all the allegations of paragraph VII of the complaint, except that it admits that plaintiff has denied and does in said complaint deny that any freight was earned by, or due or payable to defendant, and demanded payment [8] of the freight withheld by defendant, and that defendant failed and refused, and still fails and refuses, to return said freight or any part thereof, and in this connection alleges that this defendant is entitled to the whole of said freight.

* * * *

Further answering the complaint herein, and as a Second Separate and Affirmative Defense thereto, defendant alleges as follows:

The bill of lading issued for the shipment referred to in the complaint contains, among others, the following provisions:

“2. Provided due diligence shall have been exercised to make the vessel in all respects seaworthy and properly manned, equipped and supplied, the Carrier shall not be liable, as Carrier or otherwise, for any loss, damage, delay or default, whether occurring during transit or before, or after, or during, or while awaiting loading, transshipment, discharge, delivery or other disposition of the goods, * * * by enemies, pirates, robbers or thieves; by arrest or restraint of Government, princes, rulers or peoples; by prolongation of the voyage; by detention, or accidental delay; * * *.”

Due diligence was exercised to make the said vessel in all respects seaworthy and properly manned, equipped and supplied.

Any loss sustained by plaintiff was not caused or contributed to by any fault or neglect on the part of the defendant or on the part of the vessel, but was the result of causes excepted in the bill of lading provisions hereinabove set forth.

A true copy of the said bill of lading is hereto annexed marked Exhibit “A” and is hereby made a part of this answer.

* * * *

Further answering the complaint herein, and as a Third Separate and Affirmative Defense thereto, defendant alleges as follows:

The said bill of lading contains, among others, the [9] following provision:

“3. Full freight to destination * * * at declared rates (unless otherwise agreed) and all advance charges against the Goods are due and payable to the Carrier at its option upon receipt of the Goods by the latter; and the same * * * shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or vessel lost or not lost; and the Carrier shall have a lien on the Goods or any part or proceeds for the whole thereof; and the Shipper, Consignee and/or assigns shall be jointly and severally liable therefor, and notwithstanding that any lien therefor has been surrendered. Full freight and charges shall be payable, and so paid, on all damaged and unsound Goods. * * *”

As alleged in the complaint, the steamship *Absaroka* was torpedoed by a Japanese submarine on December 24, 1941. Pursuant to provisions of the bill of lading, the voyage of the *Absaroka* was terminated at San Pedro, to which port she was towed in a sinking condition; that her cargo, including the lumber cargo referred to in the complaint herein, was discharged at said port, and defendant requested instructions as to the disposition of said cargo from plaintiff; that pursuant to the above-quoted provisions of the bill of lading, the full freight on said shipment of lumber was fully

earned, and defendant was entitled to receive and retain the same.

* * * *

Further answering the complaint herein, and as a Fourth Separate and Affirmative Defense thereto, defendant alleges as follows:

The said bill of lading contains, among others, the following provisions:

“7. * * * If because of conditions, actual or reported, at or near or between the port of loading and/or the port of discharge, such as war, hostilities, insurrection, civil commotion, blockade, interdiction, or any regulations of any government, or on account of conditions of the sea or weather, or epidemic, disease, quarantine, or congestion of wharves, lack of discharging facilities, [10] riots, lockouts, stoppage of labor, strikes or labor disturbances from whatsoever cause, whether partial or general, or of the Carrier’s employees or others, or any condition whether of like nature to those named or otherwise and whether existing or anticipated, which may cause the Master to decide that it is unsafe or impracticable to proceed from or to any port or to load or discharge the goods there, or that the loading or discharging or carriage of the cargo is likely to be delayed, or that clearance from or entry to the port of loading or discharge, or communication therewith, may render the vessel liable to quarantine at any subsequent port, then the vessel may, at its option, retain the goods on board for delivery on return to the said port, and/or store the goods ashore or on lighters

or on craft at the port or place where the vessel then is or at the nearest practicable place, and/or store the goods ashore or in lighters or in craft at the port of destination or the nearest practicable place thereto or at the port nearest thereto to which the vessel is bound, and/or forward the goods from any place and by any route to or toward the port of destination by any carrier or conveyance and/or refuse to commence and/or continue loading, transshipment or forwarding operations, and/or replace on dock, lighters or elsewhere, shipments of goods previously loaded in whole or in part; all at the risk and expense of the goods, their shipper, owner and consignee. Any such disposition of the goods shall constitute a final delivery thereof, terminating all responsibility of the Carrier therefor, but the Carrier shall retain a lien on the goods for all proper charges and expenses including such charges and expenses as are incurred in the retention, storage, forwarding, replacing or other disposition of the goods as aforesaid. * * *

Pursuant to the aforementioned provisions of the bill of lading, the cargo of said vessel, including the shipment referred to in the complaint, was discharged at San Pedro, and said disposition of the goods under the provisions of the bill of lading above quoted constituted a final delivery thereof, terminating all responsibility of the defendant therefor.

* * * *

Furthering answering the complaint herein, and

as a Fifth Separate and Affirmative Defense thereto, defendant alleges as follows:

The said bill of lading contains, among others, the following provisions: [11]

“4. Note Particularly: Written notice of claim for loss, damage, shortage, conversion, misdelivery, failure or delay in delivery, of any cargo covered by this bill of lading must be given to the Carrier at its office or agency at port of destination by or in behalf of shippers, consignees, or owners of the cargo, or other parties in interest, within 48 hours after removal of said goods from the wharf or vessel, and full particulars of all claims (disclosing the nature and extent thereof) for cargo covered by this bill of lading must be presented in writing to the Carrier at its office or agency at the port of destination by or in behalf of shippers, consignees, or owners of the cargo, or other parties in interest, within 10 days after the removal of said goods from the wharf or vessel; or if the vessel or cargo be lost or stranded within 10 days from date of notice of any such loss or stranding, and the earliest newspaper mention of loss or stranding shall be and fix the date of such notice; and if any claim and/or notice of claim be not so presented as provided for in this paragraph, said claim shall be, and by every court be held to have been, waived and released, and to be abandoned and barred. No suit or action on any claim, or to recover for any alleged loss, damage, shortage, conversion, misdelivery, failure or delay in delivery of the whole or any part of the cargo covered by this bill

of lading shall be maintained unless instituted within 90 days from and after the date that written notice of claim is required to be presented as above stated; and every suit or action of whatsoever description not commenced within said 90 days as aforesaid shall be, and by every court held to have been, waived and released, and to be abandoned and barred, and all claims and demands against the Carrier shall be held to have been waived and released by the shippers, consignees, and owners of the cargo, and by any all other parties in interest. Nothing shall be deemed to be a waiver of the provisions of this paragraph except an express written waiver therefor signed by the Carrier."

Defendant alleges on information and belief that written notice of claim was not given to the carrier within 48 hours after removal of said goods from the wharf or vessel, nor was any statement of particulars presented in writing to the carrier within ten days after the removal of said goods from the wharf or vessel; and suit to recover upon the alleged claim was not brought within ninety days after the giving of written notice in accordance with the terms of the bill of lading; and by reason of the premises [12] plaintiff is barred from recovering herein.

Wherefore, defendant prays that the complaint herein be dismissed with costs.

/s/ LILLICK, GEARY, OLSON &
CHARLES,

Attorneys for Defendant.

[Endorsed]: Filed April 27, 1944. [13]

[Title of District Court and Cause.]

STIPULATION FOR PRE-TRIAL ORDER

The parties hereto, through their counsel, stipulate and agree that a pre-trial order may be entered as follows:

1. That the bill of lading attached hereto as Exhibit 1 is one of the bills of lading which were issued for the shipments [14] referred to in the complaint herein, and like bills of lading were issued covering all the shipments mentioned in said complaint, and all of same are deemed to be admitted in evidence.

2. That the attached copy of invoice designated Exhibit 2 is a true copy of one of the original invoices issued in connection with the shipments referred to in the complaint herein, and like invoices were issued covering all of the shipments mentioned in said complaint, and all of same are deemed to be admitted in evidence.

3. That the attached copy of wire dated April 14, 1942, addressed to McCormick Steamship Co., designated Exhibit 3 herein, is a true copy of a telegram sent by War Shipping Administration to McCormick Steamship Company on said date, and said copy may be introduced in evidence in lieu of the original telegram without further identification or the requiring of further proof that the wire was sent by the War Shipping Administration and received by McCormick Steamship Company on April 14, 1942.

4. That the attached copy of order designated Exhibit 4 is a true copy of one of the orders placed by plaintiff with defendant covering one of the ship-

ments referred to in the complaint herein, and like orders were placed by plaintiff with defendant covering all of the shipments mentioned in said complaint, and all of same are deemed to be admitted in evidence.

5. That the attached acceptance of order designated Exhibit 5 is one of the original acceptances by defendant of the orders in connection with the shipments referred to in the complaint herein and like acceptances of orders were made by defendant covering all of the shipments mentioned in said complaint, and all of the same are deemed to be admitted in evidence.

6. That the following facts are agreed to: The steamship [15] Absaroka sailed from St. Helens, Oregon, on December 18, 1941, bound for the ports of Brooklyn, New York; Port Newark, New Jersey; and Philadelphia, Pennsylvania, carrying a full cargo of lumber. The entire cargo was loaded at St. Helens, Oregon.

On December 24, 1941, the steamship Absaroka was struck on her starboard quarter by a torpedo from a Japanese submarine when approximately five miles off Point Fermin, California. The torpedo struck the vessel between the No. 4 and 5 holds approximately at the level of the 'tween deck. The explosion tore a hole in the shell of the ship approximately fifteen feet by twenty feet in size, blew off a small part of the after deckload of lumber, and caused the vessel to settle heavily by the stern with an 18° list to starboard. A general alarm was sounded, SOS signals were flashed by radio and the

master immediately ordered the crew to abandon ship. Coast Guard cutters and privately owned tugs went to the assistance of the Absaroka which commenced to tow the vessel towards Los Angeles Harbor.

The Absaroka was towed by six tugs inside the San Pedro breakwater and was there beached on Cabrillo Beach. Salvage operations were carried out, the lumber cargo not lost was discharged, the discharge being completed on January 7, 1942. Some of the lumber was stained by fuel oil leaking from punctured double-bottom tanks. After cleaning oil and debris from the No. 5 hold and the machinery space, the Absaroka was placed on dry dock at the plant of Bethlehem Steel Company on January 19, 1942. Upon completion of survey of the vessel's damages, repair specifications were drawn and a repair contract was negotiated with the Bethlehem Steel Company for an agreed price of \$310,000, the tender being dated January 22, 1942. Additional damages were discovered during the performance of repairs and a supplementary specification covering [16] these damages was prepared and submitted to the Bethlehem Steel Company, who submitted a tender in the amount of \$14,827 under dated of May 7, 1942, to cover this additional work. Repairs were completed and a satisfactory dock trial was run on May 9, 1942.

The Absaroka was in all respects in seaworthy condition and properly manned, equipped and supplied on sailing from St. Helens, and the cargo was properly stowed. The Absaroka left St. Helens

under sailing orders of the United States Navy authorizing the vessel to proceed. She was to call at Los Angeles for fueling. During the voyage, and on or about December 20, the master received orders from the Commandant of the Twelfth Naval District to put into San Francisco, these orders being issued after knowledge had been received of the presence of Japanese submarines on the Pacific Coast. The master subsequently, on December 21st, received further Navy orders to disregard the instructions to put into San Francisco.

As a result of the torpedoing, salvage and other general average expenses were incurred, as shown by General and Particular average Statement prepared by Marsh & McLennan. The total of General Average disbursements was \$154,621.95, the total of Particular Average disbursements was \$345,909.54, and the total of special damages on cargo, \$13,258.31.

The total cost of repairs (Particular Average disbursement) made by Bethlehem Steel Company was \$326,921.30.

Plaintiff was at all times mentioned in the complaint and now is a corporation organized and existing under and by virtue of the laws of the State of Connecticut and was the purchaser of the lumber mentioned in the complaint and was the owner thereof at the time of the events mentioned in the complaint.

Pope & Talbot, Inc., defendant, had a written open policy [17] of marine insurance covering freight. Under the marine policy, Pope & Talbot, Inc., was required to make a declaration of the amount of freight at risk on a particular vessel and pay prem-

iums thereon. Pope & Talbot, Inc., declared the freight under the marine policy on all cargo on the Absaroka on this voyage. Pope & Talbot, Inc., also secured an insurance binder purporting to be in the amount of \$85,000, and to cover freight on the cargo on the Absaroka on this voyage against war risk. The insurance company is contesting its obligations under said binder. The total freight for all cargo on said vessel on this voyage was approximately \$80,000. Photostatic copy of such binder is attached hereto marked Exhibit 6 and said photostatic copy may be introduced in evidence in lieu of the original binder and without further identification or proof.

The amount of freight for all the shipments mentioned in the complaint is correctly computed at \$10,543.85.

7. Counsel for the parties desire to leave open the other questions of fact and issues in the case and will endeavor to settle as many of them as possible by further agreements and stipulations.

Dated October 30, 1944.

FARNHAM P. GRIFFITHS,
McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE,

Attorneys for Plaintiff.

ALLAN E. CHARLES,
LILLYCK, GEARY, OLSON &
CHARLES,

Attorneys for Defendant.

It is so ordered.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Oct. 30, 1944. [18]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

I.

Plaintiff Guernsey-Westbrook Company was at all times herein mentioned and is now a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and was the purchaser of the lumber hereinafter mentioned and was the owner thereof at the time of the events herein-after mentiond. Defendant Pope & Talbot, Inc., was at all times herein mentioned and it now is a corporation organized and existing under and by virtue of the laws of the State of California, and the owner and operator of the steamship Absaroka. This is a suit of a civil [19] nature at common law where the matter in controversy, inclusive of interest and costs, exceeds the sum of \$3,000.

II.

Prior to December 13, 1941, plaintiff agreed to buy from defendant and defendant agreed to sell to plaintiff a quantity of Douglas fir lumber amounting in all to approximately 664,991 feet net board measure to be shipped by steamer by defendant from St. Helens, Oregon, to Brooklyn, New York. By the terms of said agreement of sale the purchase price of said lumber included the ocean freight from St. Helens, Oregon, to Brooklyn, New York, at the rate of \$16.00 per thousand board feet, said \$16.00 per thousand board feet payable upon arrival of lumber at destination.

That the copy of the order attached to the stipulation of the parties filed herein on October 30, 1944, and designated Exhibit 4 therein, is a true copy of one of the orders placed by plaintiff with defendant covering the purchase of a part of the above-mentioned lumber and like orders were placed by plaintiff with defendant covering all of the purchases of said above-mentioned lumber.

That the acceptance of order attached to said stipulation filed herein on October 30, 1944, and designated therein Exhibit 5, is one of the original acceptances by defendant of the orders of plaintiff for the purchase of a portion of the lumber above-mentioned and like acceptances of orders were made and executed by defendant covering all of the purchases of the above-mentioned lumber.

The copy of the invoice attached to said stipulation and designated therein Exhibit 2, is a true copy of one of the original invoices issued by defendant to plaintiff covering the purchase of [20] a portion of the above-mentioned lumber and like invoices were issued by defendant to plaintiff covering all of the purchases of said lumber.

All of said Exhibits above-mentioned, numbered 4, 5 and 2, attached to said stipulation are incorporated herein with like effect as though set forth herein in full.

The above-mentioned orders and acceptances set forth the terms of the purchase of all of said lumber above-mentioned by plaintiff from defendant.

The purchase price, other than the portion thereof equivalent to the ocean freight, less a discount of 2 percent, was to be paid on presentation of a sight draft with customary shipping documents attached, including a negotiable bill of lading to the order of Marine Midland Trust Company of New York.

III.

On or about December 13, 1941, defendant caused said lumber to be loaded on board its steamship *Absaroka*, and on said date defendant issued various bills of lading covering said shipment, wherein defendant was the shipper and whereby said lumber was consigned to the order of Marine Midland Trust Company of New York, notify the Guernsey-Westbrook Company at Hartford, Connecticut. In due course said bills of lading, with draft attached in an amount equivalent to 98 percent of the invoice price, less the ocean freight, were presented to plaintiff at Hartford, Connecticut, and said drafts were paid by, and said bills of lading were delivered to plaintiff. In and by said bills of lading the said lumber was to be transported by defendant on defendant's said steamship *Absaroka* from St. Helens, Oregon, unto the port of Brooklyn, N. Y., via the Panama Canal, and the freight on said lumber was to be [21] collected at destination. On or about December 18, 1941, said steamer *Absaroka*, with plaintiff's lumber on board, sailed from the said port of St. Helens, Oregon.

The bill of lading attached to said stipulation filed herein October 30, 1944, and designated therein Ex-

hibit 1, is one of the bills of lading which were issued for the above-mentioned shipments of lumber and like bills of lading were issued covering all of the shipments of all of said lumber, and said bill of lading is hereby referred to and incorporated herein with like effect as though herein set forth in full.

IV.

The steamship Absaroka sailed from St. Helens, Oregon, on December 18, 1941, bound for the ports of Brooklyn, New York; Port Newark, New Jersey, and Philadelphia, Pennsylvania, carrying a full cargo of lumber. The entire cargo was loaded at St. Helens, Oregon.

On December 24, 1941, the steamship Absaroka was struck on her starboard quarter by a torpedo from a Japanese submarine when approximately five miles off Point Fermin, California. The torpedo struck the vessel between the No. 4 and 5 holds, approximately at the level of the 'tween deck. The explosion tore a hole in the shell of the ship approximately fifteen feet by twenty feet in size, blew off a small part of the after deckload of lumber and caused the vessel to settle heavily by the stern with an 18° list to starboard. A general alarm was sounded, SOS signals were flashed by radio and the master immediately ordered the crew to abandon ship. Coast Guard cutters and privately owned tugs went to the assistance of the Absaroka, which commenced to tow the vessel towards Los Angeles Harbor. [22]

The Absaroka was towed by six tugs inside the

San Pedro breakwater and was there beached on Cabrillo Beach. Salvage operations were carried out, the lumber cargo not lost was discharged, the discharge being completed on January 7, 1942. Some of the lumber was stained by fuel oil leaking from punctured double-bottom tanks. After cleaning oil and debris from the No. 5 hold and the machinery space, the Absaroka was placed on dry dock at the plant of Bethlehem Steel Company on January 19, 1942. Upon completion of survey of the vessel's damages, repair specifications were drawn and a repair contract was negotiated with the Bethlehem Steel Company for an agreed price of \$310,000, the tender being dated January 22, 1942. Additional damages were discovered during the performance of repairs and a supplementary specification covering these damages was prepared and submitted to the Bethlehem Steel Company, who submitted a tender in the amount of \$14,827 under date of May 7, 1942, to cover this additional work. Repairs were completed and a satisfactory dock trial was run on May 9, 1942.

The Absaroka was in all respects in seaworthy condition and properly manned, equipped and supplied on sailing from St. Helens, and the cargo was properly stowed. The Absaroka left St. Helens under sailing orders of the United States Navy authorizing the vessel to proceed. She was to call at Los Angeles for fueling. During the voyage, and on or about December 20, the master received orders from the Commandant of the Twelfth Naval District to put into San Francisco, these orders

being issued after knowledge had been received of the presence of Japanese submarines on the Pacific Coast. The master subsequently, on December 21st, received further Navy orders to disregard the instructions to put into San Francisco. [23]

As a result of the torpedoing, salvage and other general average expenses were incurred, as shown by General and Particular Average Statement prepared by Marsh & McLennan. The total of General Average disbursements was \$154,621.95, the total of Particular Average disbursements was \$345,909.54, and the total of special damages on cargo, \$13,258.31.

The total cost of repairs (Particular Average disbursement) made by Bethlehem Steel Company was \$326,921.30.

V.

On or about February 5, 1942, defendant notified plaintiff that it intended to abandon the voyage at Los Angeles, California. Plaintiff protested against said abandonment. Defendant declined to carry said lumber to destination. At said time it was difficult, if not impossible, for plaintiff to obtain space for shipment of said lumber on other inter-coastal vessels.

In its notice of the abandonment of said voyage, defendant for the first time mentioned to plaintiff the subject of freight on plaintiff's shipments, notwithstanding the abandonment of the voyage, by stating: "We reserve our lien and right against the freight and other expenses in accordance with

the terms of the bill of lading.” Plaintiff then denied and ever since has denied and does now deny that any freight had been earned on its shipments of said lumber. After the notice of abandonment and after considerable negotiation, in order to minimize damages and because of defendant’s facilities for handling lumber, it was agreed by all parties that the cargo of lumber, including that belonging to plaintiff, should be sold at Los Angeles, but such consent was given by plaintiff without prejudice to its contention that the abandonment of said voyage was unjustified, and without prejudice to its contention that [24] no freight was due. Said cargo of lumber, including plaintiff’s lumber, was ultimately sold by defendant at Los Angeles, California, for the account of the owners of said cargo.

On or about January 11, 1943, the proceeds of the sale of plaintiff’s lumber, less certain general average and salvage charges and other expenses, and less the sum of \$10,543.85 which defendant claimed to be due for freight for said lumber of plaintiff for the voyage from St. Helens, Oregon, to Brooklyn, New York, was tendered by defendant to plaintiff. When said sum of \$10,543.85 was withheld from the proceeds of the sale of said lumber, defendant for the first time presented freight bills to plaintiff. This was the first demand made by defendant upon plaintiff for the actual payment of said freight.

Said sum of \$10,543.85 has not since been paid by defendant to plaintiff and defendant has at all times refused to pay said sum to plaintiff.

VI.

The copy of the wire dated April 14, 1942, attached to said stipulation filed herein on October 30, 1944, and designated therein Exhibit 3, is a true copy of a telegram sent by War Shipping Administration to McCormick Steamship Company on said date and received by McCormick Steamship Company on said date.

McCormick Steamship Company, a corporation, and McCormick Lumber Company, a corporation, were both absorbed by defendant Pope & Talbot, Inc., and Pope & Talbot, Inc., succeeded to the right and assumed the obligation of McCormick Steamship Company and McCormick Lumber Company.

Possession of said vessel Absaroka was not taken by War Shipping Administration pursuant to said telegram of April [25] 14, 1942, but said vessel was chartered to War Shipping Administration by a Time Charter dated May 9, 1942, for the charter hire of \$4.10 per deadweight ton of 8,538 deadweight tons per month, or \$35,005.80 per month on sailings prior to May 16, 1942, and on sailings on and after May 16, 1942, \$4.35 per deadweight ton per month, or \$37,140.30 per month.

VII.

Defendant Pope & Talbot, Inc., secured sufficient marine and war risk insurance to cover all freight on all cargo on board said Absaroka on the voyage in question, all of which freight for all cargo on said vessel was approximately \$80,000. The Insurance Company is contesting its obligations under the

war risk insurance on all cargo on the vessel, on grounds not pertinent to the present cases.

VIII.

The amount of freight for all shipments of plaintiff on said vessel on the voyage in question is correctly computed at \$10,543.85.

The issues presented for determination by the Court on the foregoing statement of facts are as follows:

(1) Whether or not under the terms of the sale and purchase of the lumber by defendant to plaintiff, and in view of the fact that the voyage was not made, and that the lumber was not delivered to its destination at Brooklyn, New York, the plaintiff is entitled to recover that portion of the purchase price, namely \$16.00 per thousand board feet, which was included in the purchase price as the ocean freight from St. Helens, [26] Oregon, to Brooklyn, New York.

(2) Whether under the terms of the bills of lading and other documents issued covering plaintiff's shipments on the vessel Absaroka the defendant is entitled to the freight, although the voyage was not made.

(3) Whether under the terms of the bills of lading defendant is entitled to freight on the lumber shipments of plaintiff, even though the voyage was not made, in view of the circumstances under which the voyage was abandoned.

(4) Whether the defendant is entitled to freight

on the shipments of lumber of the plaintiff, although the voyage was not made, in view of all the circumstances in this case.

The foregoing Pretrial Order is hereby approved by the respective parties hereto:

/s/ FARNHAM P. GRIFFITHS,
/s/ CHARLES E. FINNEY,
/s/ McCUTCHEN, MATTHEW, GRIF-
FITHS & GREENE,
Attorneys for Plaintiff.

/s/ ALLAN E. CHARLES,
/s/ LILLICK, GEARY, OLSON &
CHARLES,
Attorneys for Defendant.

The foregoing Pretrial Order is hereby made and entered this 27th day of November, 1944.

/s/ A. F. ST. SURE,
United States District Judge.

(Duly verified.)

(Acknowledgment of Service attached.)

[Endorsed]: Filed Nov. 27, 1944. [28]

In the United States District Court, Northern
District of California, Southern Division

No. 23058-S

GUERNSEY-WESTBROOK COMPANY,
a corporation,

Plaintiff,

vs.

POPE & TALBOT, INC., a corporation,
Defendant.

In Admiralty—No. 23992-R

BLANCHARD LUMBER COMPANY OF
SEATTLE, a corporation,

Libellant,

vs.

POPE & TALBOT, INC., a corporation,
Respondent.

MEMORANDUM OPINION AND ORDER
FOR JUDGMENT

Plaintiff Guernsey-Westbrook Company sues to recover \$10,543.85, and libellant Blanchard Lumber Company sues to recover \$4322.72, constituting freight charges on shipments of lumber on defendant and respondent's vessel, the "Absaroka," on the ground that defendant and respondent [29] failed to deliver the lumber at Brooklyn and at Philadelphia, as provided for in the respective con-

tracts of sale and affreightment. The two actions were tried together. For convenience, plaintiff and libellant will hereinafter be referred to as "plaintiffs" and defendant and respondent as "defendant." The parties stipulated to pre-trial orders setting forth the facts of the cases, and except as hereinafter specified the facts are undisputed.

The Absaroka left Portland on December 18, 1941, in seaworthy condition, carrying shipments of lumber for the account of Guernsey-Westbrook Company and Blanchard Lumber Company, for delivery at Brooklyn and Philadelphia respectively. She was torpedoed off the California coast near Los Angeles on December 24, and was so badly damaged that she would have sunk except for the buoyancy of her lumber cargo. A small part of the cargo was lost overboard, and a portion stained by oil. The Absaroka was towed into San Pedro, and was repaired at a cost of approximately \$327,000. Due to priorities, the repairs could not be completed until May of 1942. Meanwhile, on February 5, 1942, after repairs had been commenced, defendant, over plaintiffs' protest, abandoned the voyage, stating in the notice of abandonment: "We reserve our lien and right against the freight and other expenses in accordance with the terms of the bill of lading." It would have been difficult, if not impossible, for plaintiffs to obtain space for shipment of the lumber on other intercoastal vessels. After the notice of abandonment and considerable negotiation, it was agreed that the lumber should be sold at Los Angeles, [30] without prejudice to

plaintiffs' rights. The lumber was thereafter sold for plaintiffs' account, and the freight moneys which are the subject of the present suits were deducted from the purchase price by defendant.

On April 14, 1942, the War Shipping Administration telegraphed defendant that it required use of the vessel *Absaroka* and requested her delivery after completion of repairs. While possession of the vessel was not taken by the War Shipping Administration pursuant to the telegram, the vessel was chartered to it by a time charter dated May 9, 1942. Since the charter arrangement was offered by the War Shipping Administration as an alternative to the requisitioning of the vessel, it may be said to have had the legal effect of a requisition.

Prior to the commencement of the voyage, defendant secured sufficient marine and war risk insurance to cover all freight and all cargo on board the *Absaroka*, or approximately \$80,000. The insurance company is contesting its obligation under the war risk insurance on all cargo on the vessel, on grounds not pertinent to the present cases.

The issues presented for determination by the court, as set forth in the pre-trial orders, are as follows:

First. With regard to plaintiff *Guernsey-Westbrook Company*, whether or not under the terms of the sale and purchase of the lumber, and in view of the fact that the voyage was not made, and that the lumber was not delivered to its destination at Brooklyn, New York, said plaintiff is entitled to recover

the portion of the purchase price included in the purchase price as ocean freight from St. Helens, Oregon, to Brooklyn, New York. [31]

Second. With regard to both plaintiffs, whether under the terms of the bills of lading and other documents issued covering plaintiffs' shipments on the vessel Absaroka the defendant is entitled to the freight, although the voyage was not made.

Third. With regard to both plaintiffs, whether under the terms of the bills of lading defendant is entitled to freight on the lumber shipments of plaintiff, even though the voyage was not made, in view of the circumstances under which the voyage was abandoned.

Fourth. With regard to both plaintiffs, whether the defendant is entitled to freight on the shipments of lumber of the plaintiffs, although the voyage was not made, in view of all the circumstances of the case.

Defendant claims that it is entitled to the whole amount of the freight, despite the fact that the cargo was not delivered to its destination, basing its contention on the earned freight provision in the bills of lading which accompanied both shipments, providing in part as follows:

"3. Full freight to destination on weight or measurement at Carrier's option at declared rates (unless otherwise agreed) and all advance charges against the goods are due and payable to the Carrier at its option upon the receipt of the goods by the

latter; and the same * * * shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost, * * *." (Emphasis supplied.)

1. The first issue, which relates only to plaintiff Guernsey-Westbrook Company, concerns the construction of the typewritten contracts of sale and purchase and the [32] earned freight clause in the printed bill of lading. The written orders sent by that plaintiff to defendant in each case provided for shipment of lumber CIF (cost, insurance and freight) to Brooklyn, New York, "Terms—After deducting ocean freight, sight draft for 98% attached invoice, original negotiable B/L & certificate of inspection and insurance. Draw draft through Marine Midland Trust Co., New York City." The acceptances executed by defendant read as follows: "Terms: Ocean freight net cash on arrival of steamer: Balance 98% sight draft with documents attached including negotiable bill of lading to order of Marine Midland Trust Co. of New York."

Plaintiff contends that because of the terms "ocean freight net cash on arrival of steamer," delivery of the lumber was a condition precedent to the right of defendant to freight, and that the typewritten contract controls despite the earned freight clause in the bill of lading.

In support of its contention, plaintiff cites *Toyo*

Kisen Kaisha v. W. R. Grace Co., 48 F. (2d) 850, decided by this court, affirmed, 53 F. (2d) 740, Cert. Den. 273 U.S. 717. In that case plaintiff carrier sued for freight charges on a cargo intended for delivery to defendant at San Francisco, which was lost by fire at sea. The suit was based on a printed clause in the bill of lading: "said freight to be considered earned, lost or not lost." On the bill of lading was typed "freight as agreed." The letter of confirmation of verbal agreements with regard to freight terms addressed by defendant to plaintiff and accepted by plaintiff, and a letter to defendant's Valparaiso house written by defendant to notify the Valparaiso house of the shipment, contained the provision "Freight payable in San [33] Francisco on receipt of weights from Honolulu." This court held that the verbal agreement and letter of confirmation constituted the agreement of affreightment and that the bills of lading were merely receipts for the freight, given subsequently, and therefore no part of the contract of affreightment. The Circuit Court of Appeals affirmed the judgment on the ground that any conflict between the bill of lading and the earlier contract must be resolved in favor of the provisions of the earlier contract; that even though it be conceded that the bill of lading "supplemented" the earlier contract, it cannot contradict or nullify it. The court concluded that the oral agreement and confirmatory letter constituted the contract between the parties as to all matters relating to freight, and that the carrier was not entitled to earned freight.

Plaintiff contends that the contract provision in the Toyo Kisen Kaisha case for "Freight payable in San Francisco on receipt of weights from Honolulu" is no clearer or more explicit than the provision in the acceptances in the present case for "Ocean freight net cash on arrival of steamer;" that by the express terms of the contract, delivery at New York was a condition precedent to the payment of freight; and that the earned freight clause in the printed bill of lading is in conflict with this proviso of the typewritten contract and is therefore ineffective. Defendant claims that there is no conflict; that the term "Ocean freight net cash on arrival of steamer" determines how, and not when, payment of freight is to be made. It contends that the clause merely showed an election of one of the two [34] alternatives for payment of the purchase price provided by a CIF sales contract; that instead of the seller prepaying the freight and invoicing to the buyer the full purchase price, the seller was to send the freight collect and invoice the buyer for the total purchase price less the freight charges, which later the buyer agreed to pay the carrier; and that having obtained insurance on the goods and arranged for their carriage, the seller was absolved of further responsibility, and the risk of loss and liability for freight under the earned freight clause was on the buyer.

The question of risk of loss as between buyer and seller is not at issue here. The question involved is the liability of the buyer to the carrier under the contract of affreightment, which consists of the

orders and acceptances by plaintiff and defendant as buyer and seller, and the bills of lading issued by defendant as carrier. I think the contract of affreightment is ambiguous, in that it is not clear whether the provision in the acceptances "Ocean freight net cash on arrival of steamer" was intended as a condition or as a manner of payment of freight.

The general rule is that in the absence of a stipulation to the contrary, the carrier is entitled to freight only upon delivery to the consignee. *The Tornado*, 108 U.S. 342; *Burn Line v. U. S. & A. S. S. Co.*, 162 Fed. 298; *The Gracie D Chambers*, 253 Fed. 182; 58 C. J. §829. An agreement for earned freight must be so clear and unambiguous in its terms "as to leave no doubt that such was the intention in framing the contract of affreightment. Otherwise the general rule must prevail." *In re. Equitable Insurance Co.*, 88 Mass. 222, 224; *Norton* [35] *Crossing Co. v. Martin* (Ala.) 81 So. 71, 73; 58 C. J. 856. In the light of these rules and the fact that defendant prepared the acceptances and the bills of lading in question, I think that the ambiguity should be resolved in favor of plaintiff *Guernsey-Westbrook Company*. I therefore conclude that the typewritten contract provided that delivery should be a condition to the payment of freight, that this provision is in conflict with the earned freight clause in the bill of lading, and that the contract falls within the rule set forth in the *Toyo Kisen Kaisha* case.

With regard to plaintiff *Blanchard Lumber Com-*

pany, the contract which it made with defendant as shipper was FAS, that is, free aboard ship at St. Helens, Oregon, and the above discussion is not applicable to that plaintiff. The remaining issues, which concern the construction and legal effect of the earned freight clause, apply to both plaintiffs.

2. Plaintiffs claim that the earned freight clause was an optional one, and that since the first demand for freight was made by defendant after the abandonment of the voyage, it was too late for the exercise of the option. The defendant claims that the earned freight clause is not optional but is self-operating. The clause in question reads as follows:

“3. Full freight to destination on weight or measurement at Carrier’s option at declared rates (unless otherwise agreed) and all advance charges against the goods are due and payable to the Carrier at its option upon receipt of the goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due [36] and payable to the Carrier at any stage, before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost, * * *.”
(Emphasis supplied.)

The first option obviously refers to "weight or measurement"; the second refers to the right of the carrier to declare freight due and payable upon receipt of the goods. The latter option, as defendant states, was not exercised. The remainder of the clause, appearing after the semi-colon, necessarily relates to the carrier's right to freight "goods or vessel lost or not lost". The words "and the same" at the beginning of the second portion of the clause, can logically only relate to "full freight to destination" and not, as contended by plaintiffs, to "the freight which has become due and payable through the exercise of defendant's option." The latter portion of the clause can only be intended to provide for the contingency of defendant's inability to deliver the goods, whether advance freight and charges have or have not been paid. Otherwise the words "without deduction (if unpaid) or refund in whole or in part (if paid)" would be meaningless. It will also be noted that while the first section of the clause relates to freight and advance charges payable upon receipt of the goods by the carrier, at its option, the second portion relates to freight and to "further sums" which in their nature would become due after receipt of the goods, whether or not the option had been exercised, indicating that the exercise or non-exercise of the option would have no bearing on the effectiveness of the latter portion of the clause. In the lower right-hand corner on the face of the bill of lading is a "framed" space where freight may be designated either as "total collect" or "total prepaid". It

would be an unreasonable and forced [37] construction of the clause to find that defendant intended to secure its freight charges, in case of its inability to deliver the cargo, only if the same had been prepaid. I conclude that the earned freight clause is self-executing and that no option was required to be exercised to make it effective.

3. Plaintiffs contend that defendant was not justified in the abandonment of the voyage over their protest; that only if there was a commercial frustration of the voyage would defendant be entitled to freight under the earned freight clause. They cite *Mitsubishi Shoji Kaisha v. Societe Purfina Maritime (The Laurent Meeus)*, 133 F. (2d) 552 (C.C.A. 9, 1942), which defines the phrase "steamer or goods lost or not lost" as follows:

"It is established to mean any frustration of the voyage not caused by the act of the owner, including a frustration by government embargo within the restraints of princes, rulers and people clause, before the bill of lading containing the lost or not lost clause has been executed and when the vessel has not broken ground. *International Paper Co. v. The Gracie D. Chambers*, 248 U.S. 337, 391, 39 S. Ct. 149, 150, 63 L. Ed. 318."

The frustration of an adventure depends upon the facts of each case. *The Styria*, 186 U.S. 1.

Defendant contends that the facts connected with the abandonment bring it within the doctrine of commercial frustration. Mr. Joseph A. Lunny, vice-president and director of operations of defendant,

who determined upon the abandonment of the voyage, testified regarding his reasons for his decisions:

(a) That defendant could not determine how long it would take to repair the vessel, and thought in the interests of the cargo and all concerned, it was best to [38] abandon the voyage. Notice of abandonment was given on February 5, 1942.

(b) That because the lumber was damaged by water and oil, and because the Coast Guard would not allow it to be piled high enough in the yard and defendant did not have labor enough to pile it properly, it would have deteriorated over a period of months, due to "burning" or dry rot, and would have been likely to warp; that due to the fire hazard it was necessary to employ a watchman, which made the storage charges high.

The following reasons, as may be ascertained from his testimony, did not contribute materially to Mr. Lunny's decision, but are urged in defendant's brief:

(c) That a submarine menace existed upon the intercoastal route which would justify the termination of the voyage;

(d) That there was expectation in defendant's mind that the War Shipping Administration would requisition the vessel, and that it did in effect requisition her as of the time she should be repaired, by wire dated April 14, 1942.

A. Plaintiffs urged that delay is not sufficient reason for the abandonment. The bill of lading

provides that "Carrier is not and shall not be required to deliver said packages at the port of discharge or port of destination at any particular time, or to met any particular market, or in time for any particular use." Section VI(a) of "Official West Coast Standard Sales and Shipping Practices" etc., published and distributed by West Coast Lumbermen's Association, of which defendant was a member, contains [39] a similar provision, as between seller and buyer, with respect to delay. Plaintiffs reasonably contend that the right to complete the voyage despite delay carried with it a correlative duty to carry out the contract despite delay, in the absence of extraordinary circumstances. Plaintiffs indicated by their objection to the abandonment a willingness to accept delayed shipments. There is no showing that the purposes of the contract would be frustrated by a indefinite delay. Also, Bethlehem Steel Company tendered defendant its offer for repairs on January 22, 1942, and the repair contract was negotiated. The repairs were actually completed on May 9, 1942. There are not sufficient facts to justify defendant's determination, of which notice was given on February 5, or two weeks after the offer for repairs, that there would be such an inordinate delay in repairing the vessel as to justify an abandonment.

B. Plaintiffs claim that there was no substantial danger of deterioration of the lumber, as indicated by the fact that some of it stood on the docks for more than five months before being sold and that there is nothing in the record to show

that it was injured thereby. They further argue that since it was their lumber, and not defendant's, and since they were willing to assume the risk of delay and any resultant damage to the lumber, it was no concern of defendant's and did not justify an abandonment. In *The Bohemia*, 38 F. 756, 758, an action involving damage to a cargo of potatoes during quarantine, the court said, "It is the general rule of the maritime law that in extraordinary circumstances, the master shall consult the shipper or consignee, where practicable, as respects his interests." I [40] think that since plaintiffs were willing to risk deterioration of the lumber, defendant may not rely on the possibility of such deterioration as a ground of abandonment.

C. While Mr. Lunny testified that there existed a submarine menace on the inter-coastal route, he based his decision to abandon the voyage primarily upon delay. The voyage was commenced after the attack on Pearl Harbor, and he testified that he was aware of the danger of torpedoes from that time; that the day after the Pearl Harbor attack he had placed war risk insurance on all defendant's vessels and the cargoes which they carried. I think for purposes of the earned freight clause defendant assumed the risk of the continuance of a condition that existed at the time it undertook the voyage. *Rotterdamische Lloyd v. Cosho Co.* (C.C.A. 9) 298 Feb. 443. Furthermore, since defendant expected the voyage to be delayed for an indefinite period, it was highly speculative what, if any, men-

ace would exist at the time the voyage could be resumed.

D. Mr. Lunny apparently did not base his decision to abandon the voyage upon the possibility that the vessel would be requisitioned. He testified that "No one could say what the condition would be at the time she was repaired. She may well have continued on her voyage." "Q. It was not a troopship or a ship that was vitally needed at that time? A. No, she was not vitally needed at that time, to the best of my knowledge; at least, we had no advice they wanted the vessel * * *." Thus it appears that the abandonment was not based upon even an apprehension of requisition by the Government. The fact that there was in effect a subsequent requisition does not relate back to and [41] validate the prior abandonment. It may have been that if defendant had not abandoned the voyage the Government would have permitted it to fulfil its existing contracts before taking possession.

Counsel for defendant states that it might have been hazardous to carry oil-soaked lumber in the hold of the ship. There is no testimony which indicates that the fear of such danger contributed in any way to the decision to abandon.

Defendant quotes paragraph 7 of the bill of lading, which gives the carrier broad rights, under certain existing or anticipated conditions such as war, blockade, government regulations etc., which may cause the Master to decide that it is unsafe or impracticable to continue the voyage, to aban-

don the voyage and store the goods at the owner's expense, retaining a lien "for all proper charges * * * ." While this provision might be a defense in case of an action against defendant for failure to deliver the lumber, it does not determine what shall as a matter of law constitute commercial frustration, entitling the owner to earned freight. Also, a clause permitting the carrier to terminate the voyage "must be given a reasonable interpretation, and the discretion conferred may not be exercised in an arbitrary or unreasonable manner, nor without substantial grounds, nor will good faith alone suffice." *The Wildwood* (C.C.A. 9) 133 F. (2d) 765, 767.

4. The fourth issue presented for decision is whether defendant is entitled to earned freight in view of all the circumstances in this case. I conclude that there was not a commercial frustration such as to entitle defendant to earned freight on the lumber which remained on the vessel [42] when the *Absaroka* was towed into San Pedro. Defendant is entitled to earned freight on the lumber lost overboard which is allocable to plaintiff Blanchard Lumber Company, such freight being in the amount of \$26.59. As heretofore stated, the earned freight clause is not applicable to plaintiff Guernsey-Westbrook Company.

At the time of the trial the Court reserved its rulings upon the admissibility of defendant's Exhibits Nos. 2 and 3.

It is Ordered:

1. Plaintiff Guernsey-Westbrook Company may have judgment as prayed for, with interest from

2. Libellant Blanchard Lumber Company may have judgment as prayed for, less the sum of \$26.59, with interest from.....

(Unless stipulated to by parties, dates from which interest shall run to be fixed upon taking further evidence.)

3. Plaintiffs' objections to the admission in evidence of defendant's Exhibits Nos. 2 and 3 are overruled.

Plaintiff and libellant may submit findings of fact and conclusions of law in their respective actions in accordance herewith.

Dated: October 2, 1945.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Oct. 5, 1945. [43]

[Title of District Court and Cause—No. 23058-S.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause came regularly on for hearing on the 27th day of April, 1945, the plaintiff Guernsey-Westbrook Company appearing by Farn-

ham P. Griffiths, Charles E. Finney and McCutchen, Thomas, Matthew, Griffiths & Greene, and the defendant appearing by Allan E. Charles, Herbert Bartholomew and Lillick, Geary, Olson & Charles, and evidence both oral and documentary having been received and the cause having been argued and submitted and the Court having considered the evidence of the arguments of counsel, the Court now makes the following: [44]

FINDINGS OF FACT

I.

At all times herein mentioned plaintiff, Guernsey-Westbrook Company, was and now is a corporation duly incorporated under the laws of the State of Connecticut.

II.

At all times herein mentioned defendant, Pope & Talbot, Inc., was and now is a corporation duly incorporated under the laws of the State of California, and was the owner and operator of the steamship Absaroka.

III.

Prior to December 13, 1941 plaintiff agreed to buy from defendant and defendant agreed to sell to the plaintiff a quantity of Douglas fir lumber to be shipped by steamer by defendant from St. Helens, Oregon, to Brooklyn, New York.

That the copy of the order for a portion of said lumber attached to the stipulation of the parties filed herein on October 30, 1944, and designated

Exhibit 4 therein, is a true copy of one of the orders placed by plaintiff with defendant covering the purchase of a part of the above mentioned lumber, and like orders were placed by plaintiff with defendant covering all of the purchases of said above mentioned lumber.

That the acceptance of order attached to said stipulation filed herein on October 30, 1944, and designated therein Exhibit 5, is one of the original acceptances by defendant of the orders of plaintiff for the purchase of a portion of the lumber above mentioned, and like acceptances of orders were made and executed by defendant covering all of the purchases of the above mentioned lumber.

The copy of the invoice attached to said stipulation and [45] designated therein Exhibit 2 is a true copy of one of the original invoices issued by defendant to plaintiff covering the purchase of a portion of the above mentioned lumber, and like invoices were issued by defendant to plaintiff covering all of the purchases of said lumber.

The bill of lading attached to said stipulation filed herein on October 30, 1944, and designated therein Exhibit 1, is one of the bills of lading which were issued for the above mentioned shipments of lumber and like bills of lading were issued covering all of the shipments of all of said lumber.

IV.

On or about December 13, 1941 defendant caused said lumber to be loaded on board its steamship

Absaroka at the port of St. Helens, Oregon, and on said date defendant issued bills of lading as above mentioned covering said shipments. It was provided in said bills of lading that the said lumber was to be transported by defendant on said steamship Absaroka from St. Helens, Oregon, to the Port of Brooklyn, New York, and the freight on said lumber was to be collected at destination. The steamship Absaroka sailed from St. Helens, Oregon, on December 18, 1941, in a seaworthy condition, carrying the above mentioned shipments of lumber. She was torpedoed off the California coast near Los Angeles on December 24, 1941 and was so badly damaged that she would have sunk except for the buoyancy of her lumber cargo. A small portion of the cargo was lost overboard and a portion stained by oil.

V.

After the above mentioned torpedoing the steamship Absaroka was towed into San Pedro where she was repaired at a cost of approximately \$327,000 after the cargo of lumber had been removed. [46] Due to priorities, the repairs were not completed until May 9, 1942. Meanwhile, on February 5, 1942, after repairs had been commenced defendant, over plaintiff's protest, notified plaintiff that it abandoned the voyage at Los Angeles, California, and refused to carry the lumber to destination. Defendant stated in the written notice of abandonment: "We reserve our lien and right against the freight and other expenses in accordance with the terms of the bill of lading." It

would have been difficult, if not impossible, for plaintiff to obtain space for shipment of the lumber on other intercoastal vessels. After notice of abandonment and considerable negotiation it was agreed that the lumber should be sold at Los Angeles without prejudice to any of the rights of plaintiff. The lumber was thereafter sold for plaintiff's account and the freight moneys, which are the subject of the present suit, were deducted from the purchase price by defendant. The amount of the freight moneys withheld by defendant is \$10,543.85 and no part of that sum has since been paid by defendant to plaintiff.

VI.

On April 14, 1942 the War Shipping Administration telegraphed defendant that it required the use of the vessel *Absaroka* and requested her delivery to the War Shipping Administration after completion of the repairs. The vessel was chartered to War Shipping Administration by a time charter dated May 9, 1942.

VII.

Prior to the commencement of the voyage above mentioned defendant secured sufficient marine and war risk insurance to cover all freight on all cargo on board the *Absaroka* in the approximate sum of \$80,000. The Insurance Company is contesting its obligations under the war risk insurance on all cargo on the [47] vessel on grounds not pertinent to the present case.

VIII.

The offer or bid of Bethlehem Steel Company for the repair of the steamship Absaroka was tendered to the defendant on January 22, 1942, and the repair contract was negotiated on that day. Plaintiff, by its objection to the abandonment of the voyage, expressed its willingness to accept delayed shipments. On February 5, 1942, defendant did not have sufficient facts upon which to base a determination that there would be such unreasonable delay in repairing the vessel as to justify an abandonment. The bills of lading under which the shipments of lumber were being carried provided that the carrier should not be required to deliver the shipments at the port of discharge or port of destination at any particular time or to meet any particular market or in time for any particular use, and Section VI(a) of the Official West Coast Standard Sales and Shipping Practices contains a similar provision. The lumber which remained on the docks for more than 5 months after it was unloaded from the Absaroka did not sustain any damage or deterioration.

IX.

The danger from submarine attacks to a vessel bound on an intercoastal voyage existed at the time the steamship Absaroka sailed from St. Helens, Oregon, on this voyage. Defendant was aware of that danger at the time that the vessel sailed. Defendant did not know on February 5, 1942, what situation would exist with respect to danger from submarine attack at the time when the repairs to

the vessel would be completed. Since defendant expected the voyage to be delayed for an indefinite period, it was highly speculative what, if any, menace would exist at the time the voyage could be resumed. Defendant based its decision to abandon the voyage primarily on delay. [48]

X.

The defendant did not base its decision to abandon the voyage upon the possibility that the vessel would be requisitioned by the War Shipping Administration. The *Absaroka* was not suitable for a troopship and in the opinion of defendant was not vitally needed by the War Shipping Administration at the time when the voyage was abandoned. The defendant had not been advised that the Government required the *Absaroka* when it abandoned the voyage on February 5, 1942.

XI.

The abandonment of the voyage on February 5, 1942, was based primarily upon the ground that it could not be determined how long it would take to repair the steamship *Absaroka*, and that because the lumber was damaged by water and oil, and because the Coast Guard and the Navy would not allow it to remain piled high and defendant did not have labor enough to pile it properly, it would have deteriorated over a period of months due to "burning" or dry rot and would have been likely to warp; that due to the fire hazard it was necessary to employ a watchman, which made the storage charges high.

XII.

The contract of affreightment is contained in the above mentioned orders and acceptances and the bills of lading issued by the defendant as carrier. The typewritten provisions in the orders and acceptances made the delivery of the lumber at its destination in Brooklyn, New York, a necessary condition to be fulfilled before plaintiff was required to pay freight for the transportation of the lumber from St. Helens, Oregon, to Brooklyn, New York. The bills of lading contained a printed earned freight clause. There is a conflict between the above [49] mentioned typewritten provisions of the orders and acceptances and the printed earned freight clause of the bills of lading, and in this situation the typewritten provisions prevail.

From the foregoing facts the Court renders the following

CONCLUSIONS OF LAW

I.

There was no commercial frustration of the voyage of the steamship Absaroka from St. Helens, Oregon, to Brooklyn, New York, which justified the abandonment of the voyage at Los Angeles.

II.

The contract between the parties with respect to the freight for transportation of the lumber from St. Helens, Oregon, to Brooklyn, New York, is contained in the orders and acceptances executed by the parties to this action and the bills of lading

issued by the defendant as carrier. The printed provisions of the bills of lading with respect to freight being earned and due and payable, goods or vessel lost or not lost, is in conflict with type-written provisions in the orders and acceptances which made delivery of the lumber at its destination a condition to be fulfilled before plaintiff was required to pay freight. In this situation the type-written provisions of the orders and acceptances prevail.

III.

Defendant is not entitled to retain the freight on any of the shipments of lumber.

IV.

Plaintiff is entitled to a judgment herein in the amount of \$10,543.85. [50]

V.

The earned freight clause contained in defendant's bill of lading is self-executing and no option was required to be exercised to make it effective.

Let final judgment be entered for the plaintiff in the sum of \$10,543.85, together with interest thereon at the rate of 7 per cent per annum, from the 11th day of January, 1943, until paid.

Dated: December 3, 1945.

A. F. ST. SURE

United States District Judge

[Endorsed]: Filed Dec. 3, 1945. [51]

In the Southern Division of the United States
District Court for the Northern District
of California

No. 23058-S

GUERNSEY-WESTBROOK COMPANY, a Cor-
poration,

Plaintiff,

vs.

POPE & TALBOT, INC., a Corporation,
Defendant.

JUDGMENT

The above-entitled cause having been fully tried and submitted to the court for decision and the court having heretofore rendered its findings of fact and conclusions of law ordering judgment in favor of the plaintiff and against the defendant:

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the plaintiff, Guernsey-Westbrook Company, a corporation, have and recover from the defendant Pope & Taybot, Inc., a corporation, the sum of \$10,543.85, together with costs of suit to be taxed at \$48.57, and interest on said total sum at the rate of 7 per cent per annum until said judgment shall have been fully paid and satisfied.

Dated: San Francisco, California, January 2, 1946.

A. F. ST. SURE

United States District Judge

Approved as to form:

/s/ LILLICK, GEARY, OLSEN &
CHARLES

Attorneys for Defendant

[Endorsed]: Filed Jan. 2, 1946. [52]

[Title of District Court and Cause.]

AMENDED JUDGMENT

Good cause appearing therefor, it is hereby Ordered, Adjudged and Decreed that the judgment heretofore signed and filed herein on January 2, 1946, be amended and corrected and same is amended and corrected to read as follows:

The above-entitled cause having been fully tried and submitted to the court for decision and the court having heretofore rendered its findings of fact and conclusions of law ordering judgment in favor of the plaintiff and against the defendant: [53]

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the plaintiff, Guernsey-Westbrook Company, a corporation have and recover from the defendant Pope & Talbot, Inc., a corporation, the sum of \$10,543.85 and interest on said sum at the rate of 7 per cent per annum from the 11th day of January, 1943, until said judgment shall have been fully paid and satisfied, together with costs of suit to be taxed at \$48.57.

Dated: San Francisco, California, March 26, 1946.

A. F. ST. SURE

United States District Judge

Approved as to form:

LILLICK, GEARY, OLSON &
CHARLES

Attorneys for Defendant

[Endorsed]: Filed March 26, 1946. [54]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that Pope & Talbot, Inc., a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered in this action on January 2, 1946, and from the amended judgment entered in this action on March 26, 1946.

Dated April 1, 1946.

/s/ LILLICK, GEARY, OLSON &
CHARLES

Attorneys for Appellants

(Acknowledgment of Service.)

[Endorsed]: Filed April 1, 1946. [55]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Now Comes Pope & Talbot, Inc., appellant herein, and pursuant to Rule 75-d of the Federal Rules of Civil Procedure makes the following statement of the points upon which appellant intends to rely on this appeal:

I.

The District Court erred in finding that the orders and acceptances for the sale of the lumber were part of the contract of affreightment for the transportation of the lumber.

II.

The District Court erred in failing to find that the orders of Guernsey-Westbrook Company, plaintiff, and the acceptances of Pope & Talbot, Inc., defendant, constitute the contract of sale [56] between the said Guernsey-Westbrook Company, as buyer, and Pope & Talbot, Inc., Lumber Division, as seller.

III.

The District Court erred in failing to find that the bill of lading issued by Pope & Talbot, Inc., Steamship Division, as carrier, constituted the contract of affreightment for the transportation of the lumber involved in this action.

IV.

The District Court erred in finding that the pro-

visions of the orders and acceptances made the delivery of the lumber at its destination in Brooklyn, N. Y., a necessary condition to be fulfilled before plaintiff, Guernsey-Westbrook Company, was required to pay the freight for the transportation of the lumber.

V.

The District Court erred in failing to find that the orders and acceptance constituted a C.I.F. contract of sale for the lumber under which the Guernsey-Westbrook Company, as buyer, became unconditionally obligated to pay the freight regardless of delivery of the lumber at Brooklyn, N. Y.

VI.

The District Court erred in finding that the earned freight clause of the bill of lading was in conflict with the provisions of the orders and acceptances.

VII.

The District Court erred in failing to find that Pope & Talbot, Inc., was entitled to retain the freight and thus give effect to the earned freight clause of the bill of lading.

VIII.

The District Court erred in finding that on February 5, 1942, respondent did not have sufficient facts upon which to base a [57] determination that there would be such unreasonable delay in repairing the vessel as to justify an abandonment.

IX.

The District Court erred in finding that the lumber which remained on the docks for more than five (5) months after it was unloaded from the S. S. Absaroka did not sustain any damage or deterioration and further erred in failing to find that a large portion of said lumber cargo was oil soaked as a result of the torpedoing.

X.

The District Court erred in failing to find and conclude that the charter of the vessel Absaroka to the War Shipping Administration entered into May 9, 1942, had the legal effect of a requisition since the charter was offered by the Government as an alternative to the requisitioning of the vessel and the District Court further erred in failing to find that respondent based its decision in part upon the possibility that the vessel would be requisitioned by the War Shipping Administration.

XI.

The District Court erred in failing to find and conclude that the following grounds or any of them constituted commercial frustration justifying respondent's determination to abandon the voyage of the steamship Absaroka on February 5, 1942, and to find that all of such grounds existed:

(1) That at the time of respondent's determination to abandon the voyage there was a great peril from Japanese submarine activity and many vessels were being torpedoed on the West Coast;

(2) That at the time of respondent's determination to abandon the voyage it was reasonably anticipated [58] that at the time repairs to the steamship Absaroka would be completed, such time being uncertain, that there would be great peril from Japanese submarine activities on the West Coast of the United States;

(3) That at the time of respondent's determination to abandon the voyage there was an increase in the torpedoing of vessels on the East Coast of the United States and in the Caribbean Sea by reason of German submarine activity;

(4) That at the time of respondent's determination to abandon the voyage it was reasonably anticipated that at the time repairs to the steamship Absaroka would be completed, such time being uncertain, the torpedoing of vessels on the East Coast and in the Caribbean Sea by German submarine activity would not be diminished;

(5) That at the time of Respondent's determination to abandon the voyage no intercoastal voyages were being undertaken and that it could be reasonably anticipated that at the time the repairs to the steamship Absaroka would be completed, such time being uncertain, no intercoastal voyages would be undertaken;

(6) That at the time of respondent's determination to abandon the voyage it was impossible to predict the length of time required to complete repairs on the steamship Absaroka because of priority of Army, Navy, and War Shipping Administration

vessels in obtaining repairs ahead of commercial vessels such as the *Absaroka*; [59]

(7) That at the time of respondent's determination to abandon the voyage there was a strong probability that on the completion of the repairs to the steamship *Absaroka* the vessel might be requisitioned by the government for the uncertain duration of the war;

(8) That at the time of respondent's determination to abandon the voyage there was a strong probability that at the time of completion of repairs to the steamship *Absaroka* the vessel might be required by the government to proceed in some direction other than intercoastal;

(9) That at the time of respondent's determination to abandon the voyage there was a strong probability that at the time of completion of repairs to the steamship *Absaroka* there would be no convey available;

(10) That at the time of respondent's determination to abandon the voyage there was a strong probability that at the time the repairs to the steamship *Absaroka* would be completed the damage to the cargo by oil and salt water would be such as to make it a worthless cargo;

(11) That at the time of respondent's determination to abandon the voyage there was insufficient labor available to properly pile the lumber to protect it from fire and deterioration and it could be reasonably anticipated that such condition would continue;

(12) That at the time of respondent's determination to abandon the voyage the respondent knew before the voyage could be resumed there would be a long period of storage and that the costs of storage would be excessive. [60]

(13) That at the time of the respondent's determination to abandon the voyage the United States Coast Guard required respondent to employ watchmen to guard and protect the lumber from fire resulting from the soaking of the lumber by oil, which costs would be excessive.

XII.

The District Court erred in failing to find that the factors enumerated in paragraph XI above did not exist at the time the contract to transport libellant's lumber was made.

XIII.

The District Court erred in finding and concluding that there was no commercial frustration of the voyage of the steamship Absaroka from St. Helens, Oregon, to Brooklyn, New York, which justified the abandonment of the voyage at Los Angeles.

XIV.

The District Court erred in failing to find and conclude that there was a commercial frustration of the voyage of the steamship Absaroka from St. Helens, Oregon, to Brooklyn, New York, which justified the abandonment of the voyage at Los Angeles.

XV.

The District Court erred in failing to find that

defendant is entitled to retain the freight on all of the shipments of lumber involved in the action.

EDWARD D. RANSOM
LILICK, GEARY, OLSON &
CHARLES

Attorneys for Defendant,
Pope & Talbot, Inc.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 30, 1946. [61]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That we, Pope & Talbot, Inc., a corporation, as principal, and Firemen's Fund Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of California and authorized to do a surety business in the state and northern district of California, as surety, are held and firmly bound unto Guernsey-Westbrook Company in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said Guernsey-Westbrook Company, its successors and assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

.....
.....

Sealed with our Seals and dated this 1st day of April, 1946. [62]

Whereas, on January 2, 1946, in an action pending in the Southern Division of the United States District Court for the Northern District of California between Guernsey-Westbrook Company, a corporation, as plaintiff, and Pope & Talbot, Inc., a corporation, defendant, a judgment and an amended judgment were rendered against said defendant, Pope & Talbot, Inc., a corporation, and the said defendant, Pope & Talbot, Inc., a corporation, having filed a notice of appeal from such judgment and such amended judgment to the United States Circuit Court of Appeals of the Ninth Circuit;

Now, the condition of this obligation is such that if the said Pope & Talbot, Inc., a corporation, defendant, shall prosecute its appeal to effect and shall pay costs if the appeal is dismissed or the judgment affirmed, or such costs as the said Circuit Court of Appeals may award against the said Pope & Talbot, Inc., a corporation, defendant, if the judgment is modified, or in any other event, then this obligation to be void; otherwise to remain in force and effect.

This bond shall be deemed and construed to contain the provisions mentioned in Rule 10 of the above entitled court.

FIREMAN'S FUND INDEMNITY COMPANY

By

Its Attorneys in Fact (F. J.
Crips)

The foregoing bond is hereby approved this 1st day of April, 1946.

A. F. ST. SURE

United States District Judge

State of California,

City and County of San Francisco—ss.

On this 1st day of April, 1946, before me, Marie H. Stanley, a Notary Public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared F. J. Crisp, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company, and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said City and County of San Francisco the day and year in this certificate first above written.

/s/ MARIE H. STANLEY

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires November 20, 1947.

[Endorsed]: Filed April 1, 1946. [63]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR TRANSMISSION OF ORIGINAL TRANSCRIPT OF TESTIMONY AND ORIGINAL EXHIBITS

It is hereby stipulated by and between the parties hereto as follows:

1. The original transcript of testimony and proceedings at the trial April 27, 1945, shall be transmitted in its original form by the Clerk of the above entitled Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in the preparation of the Record on Appeal on the appeal of Pope & Talbot, Inc., a corporation, appellant from the original judgment made and entered in the above entitled matter on the 2nd day of January, 1946, and the amended final judgment made and entered on March 26, 1946, and said original transcript of testimony and proceedings shall be returned to the Clerk of the above entitled Court after the final [64] determination of said appeal.

2. In lieu of copies, Exhibits 1 to 3, inclusive, offered upon the trial of said matter on April 27, 1945, and Exhibits I, II, III, IV and V attached to Stipulation for Pre-Trial Order filed October 30, 1944, and deemed to be admitted in evidence by said Stipulation for Pre-Trial Order, shall be transmitted to the Circuit Court of Appeals for the Ninth Circuit in their original form as original exhibits, and said exhibits shall be returned to the Clerk of

the above entitled Court after the final determination of said appeal.

3. In lieu of copies, Exhibit A attached to and made a part of the Answer of Pope & Talbot, Inc., a corporation, filed April 27, 1944, shall be transmitted to the Circuit Court of Appeals for the Ninth Circuit in its original form as an original exhibit to the said Answer, and said exhibit shall be returned to the Clerk of the above entitled Court after final determination of said appeal.

Dated: San Francisco, California, April 22nd, 1946.

EDWARD D. RANSOM,
LILLYCK, GEARY, OLSON &
CHARLES

Attorneys for Pope & Talbot,
Inc., Appellant

FARNHAM P. GRIFFITHS
McCUTCHEN, THOMAS, MAT-
THEW, GRIFFITHS &
GREENE

Attorneys for Guernsey-West-
brook Company, Appellee

It is so ordered this 30th day of April, 1946.

CHARLES N. PRAY

United States District Judge

[Endorsed]: Filed April 30, 1946. [65]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
ON APPEAL

To the Clerk of the Above Entitled Court:

In compliance with Rule 75-A of the Rules of Civil Procedure, please include the following in the Record of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The complaint of Guernsey-Westbrook Company, filed December 23, 1943.
2. Answer of Pope & Talbot, Inc., a corporation, filed April 27, 1944.
3. Stipulation for Pre-Trial Order filed October 30, 1944, including Exhibits I, II, III, IV and V attached thereto.
4. Pre-Trial Order made and filed November 27, 1944. [66]
5. All testimony and proceedings at the trial April 27, 1945.
6. All exhibits introduced at the trial April 27, 1945.
7. Memorandum Opinion and Order for Judgment filed October 5, 1945.
8. Findings of Facts and Conclusions of Law filed December 3, 1945.
9. Judgment filed and entered January 2, 1946.
10. Amended Judgment filed and entered March 26, 1946.

11. Notice of Appeal filed April 1, 1946.
12. Bond for Costs on Appeal filed April 1, 1946.
13. Stipulation and Order of Transmission of original transcript of testimony and original exhibits.
14. Statement of Points Upon Which Appellant Intends to Rely on Appeal.
15. This Designation of Portions of Record on Appeal.

EDWARD D. RANSOM,
LILLICK, GEARY, OLSON &
CHARLES,

Attorneys for Pope & Talbot,
Inc., Appellant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 30, 1946. [67]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 67 pages, numbered from 1 to 67, inclusive, contain a full, true, and correct transcript of the records and

proceedings in the case of Guernsey-Westbrook Co., Plaintiff, vs. Pope & Talbot, Defendant, No. 23058 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$11.35, and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 10th day of May, A. D. 1946.

[Seal]

C. W. CALBREATH

Clerk.

/s/ E. H. NORMAN,

Deputy Clerk. [68]

In the Southern Division of the United States
District Court, In and For the Northern Dis-
trict of California

Before: Hon. A. F. St. Sure, Judge.

No. 23058-S

GUERNSEY-WESTBROOK COMPANY,
a corporation,

Plaintiff,

vs.

POPE & TALBOT, INC., a corporation,
Defendant.

In Admiralty—No. 23992-R

BLANCHARD LUMBER COMPANY OF SE-
ATTLE, a corporation, and HATHEWAY-
PATTERSON CORP., a corporation,
Libelants,

vs.

POPE & TALBOT, INC., a corporation,
Respondent.

REPORTER'S TRANSCRIPT

Friday, April 27, 1945

Counsel Appearing: For Plaintiff and Libelants:
Allan E. Charles, Esq. For Defendant and Re-
spondent: Charles E. Finney, Esq.

The Court: Are these two cases consolidated for
trial, Guernsey-Westbrook Company against Pope

& Talbot, and Blanchard [1*] Lumber Company against Pope & Talbot? They are consolidated for trial?

Mr. Finney: One is at law and one at admiralty. They are not technically consolidated, but they arise out of the same circumstances and we have agreed to proceed together with the cases.

The Court: Very well. What are the issues?

Mr. Finney: If your Honor please, the cases are suits for the return of freight money for cargo that was to be carried upon the steamship "Absaroka." The "Absaroka" was torpedoed on December 24, 1941, off Point Fermin, just outside the Los Angeles Harbor, and thereafter went into Los Angeles Harbor. The vessel was badly injured in the torpedoing and the voyage was later abandoned by the carrier at Los Angeles. The lumber was later sold and the sale was handled through Pope & Talbot, the Defendant, and the Respondent, in these cases, at Los Angeles, with a reservation of the rights of the parties in all respects. The money for the sale of the lumber came into the hands of Pope & Talbot. They handled the sale, and they, Pope & Talbot have kept the money that would be the freight for carrying the goods, or lumber, to Brooklyn, New York, and one cargo to Philadelphia. So in that one the suit has been brought by us to recover that sum of freight money which we claim we were entitled to, that which we were not obliged to pay under the contract of this case. [2]

The Guernsey-Westbrook case involves a shipment

* Page numbering appearing at top of page of original Reporter's Transcript.

of lumber. The lumber came from St. Helens, Oregon. It was loaded there. The sale of the lumber was by Pope & Talbot. It is all one company, but they operate a lumber division and a steamship division. The lumber was sold by Pope & Talbot to Guernsey-Westbrook Company under a set of documents which are covered by stipulation in connection with the pre-trial order. A stipulation has already been made that covers a great deal of the case, and all of our case is covered by pre-trial order. The first document was a document of Guernsey-Westbrook Company which is called an order for the lumber, addressed to Pope & Talbot, on which there appears quantities of lumber. There are a number of these documents, but we have stipulated that these in evidence are the typical ones, and that there were conditions issued for all the cargoes of like tender.

This order designates certain types and quantities of lumber to be purchased, that it was to be shipped by steamer. According to the order, the destination was CIF, Green Street, Brooklyn, New York. It reads:

“After deducting ocean freight, sight draft for 98 per cent attached invoice, original negotiable B/L & Certificate of Inspection & Insurance.”

It then specifies how the draft will be drawn. In other words, the order says that Pope & Talbot may draw a draft for the payment of the price of the lumber, and the price of the [3] lumber on which the ocean freight is based is specified in the order. It says, “Prices based on existing ocean freight rate

of \$16.00 per M' net." In other words, they pay so much for the lumber on this coast, add to the price so much for ocean freight to get it to Brooklyn.

Then on receipt of that Pope & Talbot addressed an "Acceptance of Order," which is a printed document entitled "Acceptance of Order," and it is addressed to Guernsey-Westbrook Company, in which they say, "To be delivered at ex vessel Green Street, Brooklyn, N. Y." This one specifies Green Street also. They all don't do that, but they are all at some dock in Brooklyn. It again specifies the quantities, the types of lumber. Then it says—this is the acceptance of the order; this is the document executed by Pope & Talbot—"Terms: Ocean Freight net cash on arrival of steamer; balance 98% Sight draft with documents attached, including negotiable bill of lading to order of Marine Midland Trust Company." Then also, "Any change in ocean freight rate prior to shipment will be for buyer's account." In other words, the price will go up if the ocean freight rate goes up before actual shipment. At the bottom it says, "Unless notified to the contrary at once and excepting clerical and stenographic errors order will be executed as written above and is final and binding on both of us."

Following that, Pope & Talbot issued an invoice for the lumber and which again refers to CIF, Brooklyn, New York, Sold [4] to Guernsey-Westbrook Company. The order specifies the types and quantities of lumber. Again it says, "Ocean freight net cash on arrival of steamer, balance 98% sight draft with documents attached," and so forth.

Now, our position in the case is that those are the documents under which this lumber was sold by Pope & Talbot, the defendant, to Guernsey-Westbrook, the plaintiff; that the terms of that affreightment were fixed in those documents, the freight to be payable when and if the lumber arrived in Brooklyn, New York, \$16 per thousand; that the bill of lading that was issued—there were bills of lading issued in all these cases—showed Pope & Talbot appearing as the shipper, and the lumber “Consigned to the order of Marine Midland Trust Company of New York, notify the Guernsey-Westbrook Company, Hartford, Connecticut.”

It is our position the bill of lading is a mere receipt for the goods under the theory or the principle involved in a decision by your Honor in the *Toyo Kisen Kaisha* case, which was affirmed in the Circuit Court of Appeals, where the terms of the contract of affreightment are fixed on prior agreement and the bill of lading becomes a mere receipt for the goods, and that under these documents the freight is collect when the goods are delivered from the ship's slings in Brooklyn, New York.

The respondent or defendant contends, as I understand the theory, that the bill of lading is controlling, and that there is a clause in the bill of lading that entitles it to freight [5] even though the voyage is not completed, that is, if there is a justifiable abandonment of the voyage. As to that, we say it is not a good earned freight agreement. To cover this situation it has an optional clause that was never exercised. We say in this case the bill of lading is a mere receipt.

The only other interpretation of this is what the terms of the contract say, a sale of a quantity of lumber at a certain price, in which the parties have agreed in the documents that \$16 of that price is for the transportation from the west coast to the east coast, and if the transportation from the west coast to the east coast was not made by the seller we are entitled to the return of the \$16 for freight, which they have agreed is the portion of the price attributable to transportation. The freight rate is specified in the bill of lading at \$16 a thousand, and it specifies the freight is collect.

The contract, as I have stated, is CIF, and under those CIF contracts the shipper undertakes to deliver the goods, that is, the seller either pays the freight or deducts the amount of the freight from the purchase price and sends it freight collect, pays the insurance and other costs, and sends the documents on to the consignee. In this case, the shipper is Pope & Talbot, so Pope & Talbot were responsible for the payment of the freight. It is true that Pope & Talbot were also the carrier, so they were responsible to themselves; but under CIF contracts the consignee is not responsible for the freight, [6] unless and until he receives the goods. The consignee, of course, never received the goods, because they never went forward beyond Los Angeles. That all relates to the Guernsey-Westbrook case.

As to the Blanchard case, there are not the same delivery documents, that is, the contract of sale and contract of freight were not made under these purchases and acceptances, but there was merely an

invoice issued, so as to that that suit is in admiralty rather than at law; as to that, it just turns right on the interpretation of the earned freight clause in the bill of lading. The earned freight clause, we say, is the usual clause, which provides it is fully earned at the time the delivery of goods to the carrier starts.

“Full freight to destination on weight or measurement at Carrier’s option at declared rates (unless otherwise agreed) and all advance charges against the goods are due and payable to the carrier at its option upon receipt of the goods by the latter; and the same and any further sums becoming payable to the carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims and any payments made and liability incurred by the carrier in respect of the goods (not required hereunder to be borne by the carrier) shall be deemed fully earned and due and payable to the carrier at any stage, before or after loading, of the service hereunder.” [7] Then it goes on to say the whole clause is a clause that the freight might have been deemed or declared due and payable and earned by the company at its option if it had so decided.

The pre-trial order shows that no demand was made for the freight, nothing was done to exercise the option to declare the freight due or payable prior to February 5, 1942, the date on which the carrier gave notice that the voyage was abandoned, and the cases, we say, are clear that after the torpedoing it is too late then to declare that it is. Of

course, any carrier would declare that option after a casualty that might well prevent the voyage, and that the voyage, if it was frustrated, was frustrated on December 24, 1941, when the vessel was torpedoed, and that any demand for freight after that date came too late, that the demand, the exercise of the option must be made at a time prior to the torpedoing of the vessel, prior to the frustration of the voyage.

I think that about outlines the cases. I don't want to argue the matter now. I think that outlines our theory of the case, and the reason we will not put any evidence on at this time is that the pre-trial order covers all that, the documents, and the times, and the dates, and all. I believe it is the intention of Mr. Charles to put on testimony, as I understand it, regarding the circumstances surrounding the reason for the termination of the voyage.

The Court: Mr. Charles, do you wish to make a statement [8] before you put on any evidence?

Mr. Charles: I should like, with your Honor's permission, to do so, and in opening I should like to say it is not my understanding that the testimony which I intend to put on will be entirely limited, although it will deal principally with the point Mr. Finney suggested, that is, the justification of the termination of this voyage short of destination following the torpedoing of the vessel. I think when an attack is made, as in this case, upon the earned freight clause, we should have something as to the background of this clause and its use.

I remember being somewhat shocked upon first finding out that if goods were shipped on a vessel and as a result of a storm the vessel was stranded and had to go into a port of refuge, and had to incur certain expenses, that the carrier could go after the cargo owner and require him to pay a certain proportion of those charges over and above his freight rate, which, of course, is the principle of general average. I think that people who are not fully familiar with the background of the clauses that are usually found in the bill of lading are apt to take an incorrect attitude on a clause of this kind, earned freight, because it says the carrier should have his freight, even though he does not complete the voyage, under certain circumstances. But in the past, for a number of centuries it has become the conception that a shipper of goods becomes a [9] joint venturer, in which not only the carrier, not only the shipper, but the cargo, itself, to a certain extent will participate and shoulder certain of the risks, probably because the hazards are greater, and they were certainly greater in the old days.

We have here the usual type of earned freight clause that says that the carrier, whether the freight is collected before the shipment begins or whether it is collect freight, the carrier is entitled to that freight, whether the vessel is lost or not lost, and even though the voyage is terminated, if it is terminated on the conditions reserved to the carrier in the bill of lading.

Those earned freight clauses have been used for a great many years, and clauses of this type, as we

will point out in the briefing of the case, which I assume your Honor will wish us to do, have been sustained by the courts for many, many years, and in fact as early as 1815 Judge Ellenborough sustained a clause of this character, which held that the ship will be entitled to the freight earned, notwithstanding the fact that the voyage had not been completed by reason of casualty.

In addition to this background, there is the point that this type of a freight clause is not an exceptional clause. It is in virtually universal use, and has been for years, and years, and years, and shippers who are familiar with the trade and familiar with shipping by vessel expect to find this type [10] of a clause in a bill of lading. Even in the present standard bill of lading that is required by the War Shipping Administration to be used in connection with virtually all ocean shipments under the American flag today there is just this same type of an earned freight clause. I simply point that out to show the clause is in universal use.

The opposing counsel's points, as I see them, are three. He states that he believes the earned freight clause we have is not adequate to cover the situation, in that it involved an option which provides that the carrier must exercise that option prior to the time of the loss, to require the freight to be paid. Now, it is our position, and we will elaborate on it later in our briefs, your Honor, the option provision does not relate to the question as to whether the carrier is entitled to the freight, or not. It only relates to the question of whether or not the freight

is to be determined on the basis of weight or measurement. The second time the word "option" is used in that clause simply refers to the time of payment. I would like to just take a moment, if I might. The freight clause reads as follows—I won't read all, but just regarding this option which I am directing my remarks to.

"Full freight to destination on weight or measurement at carrier's option"—the "option" there relates to the weight or measurement—"at declared rates (unless [11] otherwise agreed) and all advance charges against the goods are due and payable to the carrier at its option upon receipt of the goods by the latter."

That refers not to the question of whether the carrier may get his freight whether the vessel was lost or not, but it relates to the time of payment of the freight, whether prepaid or to be collect, and it goes on without any limitation, without any qualification of the word "option," simply that the freight shall be fully earned and due and payable to the carrier at any stage before or after loading, vessel lost or not lost. That is not an unusual form of freight clause. It is a form that differs very slightly, differs with slight variations in nearly every ocean bill of lading. I wish to point out also that the use of the word "option" is also common, but does not refer to the question whether or not the carrier will get the freight, but the question as to the time of payment. I would like to read the comparable provision in the official Government form of bill of lading which is in a recently pub-

lished standard contract form of the War Shipping Administration.

The Court: Mr. Charles, will you permit an interruption?

Mr. Charles: Certainly, your Honor.

The Court: You may proceed.

Mr. Charles: I want to simply point out that this option provision is widely found in bills of lading and I think perhaps—— [12]

The Court: Well, I wouldn't go into too much detail about that, because you will file a memorandum.

Mr. Charles: Yes. If I could just read these few words that will dispose of that point.

The Court: Yes.

Mr. Charles: Clause 15, War Shipping Administration bill of lading, standard form, reads in part:

“Freight shall be payable on actual gross intake weight or measurement or, at carrier's option, on actual gross discharge weight or measurement * * *. Full freight hereunder to port of discharge named herein shall be considered completely earned on shipment whether the freight be intended to be prepaid or to be collect at destination; and the carrier shall be entitled to all freight and charges due him, whether actually paid or not, and to receive and retain them irrevocably under all circumstances whatsoever ship and/or cargo lost or not lost or the voyage broken up as abandoned.”

The second point deals with the fact that Pope & Talbot, being both a lumber manufacturer and

a steamship operator, sold these goods to the libelant and to the plaintiff in the other case prior to the time that the goods were shipped. It is our view that that is entirely irrelevant. The fact that the goods, title was received through these orders that Mr. Finney mentioned and the acceptance of the orders is irrelevant because [13] the libelant and the plaintiff both acquired the ownership of the goods before the shipment was made by Pope & Talbot. A draft was drawn for the payment of the mill price of the goods prior to shipment, and then they were simply turned over to Pope & Talbot as a common carrier, subject to the provisions of the bill of lading and the order and acceptance of the order refers to the fact that the shipment will be made subject to carrier's usual bill of lading.

The third point, and the point which, in my belief, is the one most seriously urged, is that carrier was not entitled to terminate the voyage at San Pedro following the torpedoing of the ship, but was obligated, because the vessel could be repaired and was repaired, to re-load the goods and carry them on to destination rather than to do what they did do, which was prior to the repair of the vessel, sell the lumber as agents for the shippers, and with their consent, and to apply the proceeds to the payment of the freight, and then hold the balance for the cargo owners.

Now, I would like to produce a witness, particularly to cover the question of justification of the termination of this voyage at San Pedro. We con-

tend that the carrier was justified under the circumstances that existed, and pursuant to the privilege reserved in the bill of lading to make that determination and to hold the freight, although the voyage had not been completed to destination. [14]

I will call Mr. Lunny.

JOSEPH A. LUNNY,

called as a witness by defendant and respondent;
sworn.

Mr. Finney: Your Honor, may I say this before the examination goes on, in explanation of why we do not object to this testimony, or to cluttering up the record—we have no jury here. On our theory of the case, of course, as outlined to your Honor, this testimony would be immaterial; that is, we think the case does not turn at all on whether the voyage was properly or improperly terminated. Naturally, we say the clauses of the bill of lading have no application at all in the Guernsey-Westbrook case and it is not a good earned freight clause in the other case, so this testimony as to the reason or justification would be immaterial. I think that statement will cover it, and we will proceed much faster.

Mr. Charles: Well, I would like to be sure that that is clear. I have understood that it is opposing counsel's contention that we were not justified in the termination of the voyage, and that that point is being urged. It was, I believe, at oppos-

(Testimony of Joseph A. Lunny.)

ing counsel's request in the pre-trial order, submitted as an issue in the case. It is our position there is no burden on us except, as I say, I have alleged that the termination was justified. If the point is not involved, perhaps we will dispense with any testimony on the point. [15]

Mr. Finney: What I meant to say, Mr. Charles, was that rather than press the objection in the record we will leave it the Court to determine whether the evidence is material or not when the case is briefed and the theory is developed. That is all I meant.

Mr. Charles: That is quite satisfactory.

Direct Examination

Mr. Charles: Q. Mr. Lunny, what is your position with Pope & Talbot?

A. Vice-president, director of operations.

Q. Did you hold a similar position in December, 1941? A. I did.

Q. And in 1942? A. I did.

Q. And since that time? A. Yes.

Q. Prior to January, 1942, could you state briefly, Mr. Lunny, what the extent of your experience in steamship operation has been as far as managing is concerned? A. 25 years.

Q. A great deal of that time you were directly engaged in the operations side of the steamship business? A. Yes.

Q. You served Pope & Talbot and its predecessor in the McCormick Steamship Company?

A. Yes.

(Testimony of Joseph A. Lunny.)

Q. And the Charles R. McCormick Lumber Company, the Delaware corporation?

A. Yes.

Q. As an operating manager I assume you have had wide experience in the handling and discharge of cargoes?

A. Yes. [16]

Q. You are familiar with the problems in the carriage of lumber cargo?

A. Yes.

Q. In December, 1941, was Pope & Talbot engaged both in the operation of vessels and in the manufacture, sale and distribution of lumber?

A. Yes.

Q. Could you tell us in what service the vessels of Pope & Talbot were engaged at that time—let me withdraw that.

Prior to the war, what was the type of service in which your vessels were engaged?

A. Intercoastal and coastwise.

Q. Did you vessels handle lumber cargo?

A. Yes.

Q. That was carried, usually, or at least in part, by deckloads?

A. Yes.

Q. In what direction was the lumber moved?

A. The lumber moved eastward and southward.

Q. Did you carry any general cargo?

A. Yes.

Q. What was the direction of that movement?

A. East and west, and north and south.

Q. Was your company the owner of the steamship Absaroka in the year 1941?

A. Yes.

(Testimony of Joseph A. Lunny.)

Q. Was this vessel operated in the intercoastal service? A. Yes.

The Court: Where have I heard that name before, "Absaroka?" Was that in collision?

Mr. Charles: Yes, your Honor. That was the vessel that was involved in the collision your Honor heard in this case, the Maui, of the Matson Company, and the Absaroka. [17]

The Court: Yes.

Mr. Finney: This was the voyage following the collision, we understand.

The Court: Is that so?

Mr. Charles: Q. Do you recall whether the Absaroka commenced a voyage shortly after Pearl Harbor, December 7, 1941?

A. Yes; she went to sea on a voyage shortly after that. I believe she was loading at the time of the Pearl Harbor catastrophe.

Q. Was she loading up north? A. Yes.

Q. She was loading on an intercoastal voyage, was she? A. Yes, sir.

Q. That is, a lumber cargo going among other places, to the east coast?

A. Solely to the east coast.

Q. That would include the port of New York?

A. Yes.

Q. Did you take any precautions following the outbreak of the war with reference to the ship?

A. We took the precautions that were set forth by the War Shipping Administration and the Navy, such as painting the deckload, painting the ship;

(Testimony of Joseph A. Lunny.)

any precautions that we were advised to take by the Navy before we sailed from Columbia River.

Q. Do you recall whether the sailing date was for December 13? A. About then.

Q. That is six days after Pearl Harbor?

A. Yes.

Mr. Finney: The 18th?

The Witness: I don't recall the date. It would be more [18] near the 18th.

Mr. Finney: I think that is right.

Mr. Charles: Q. The Absaroka was torpedoed prior to the completion of the voyage?

A. Yes.

The Court: I notice in the pre-trial order mention of a date of December 13th.

Mr. Charles: We may have been mistaken in assuming that the ship sailed on the date the bill of lading was issued. I think that was alleged as the 13th in the complaint.

Mr. Finney: I think the date in the pre-trial order is December 13th, the loading and the issuing of the bill, but the sailing is stated as December 18th.

Mr. Finney: I see.

The Witness: 18th would be more nearly correct, because it is six days down.

Mr. Charles: Q. What was the date she was torpedoed?

A. December 24th.

Q. And where was the vessel torpedoed?

A. Almost to the breakwater at San Pedro.

(Testimony of Joseph A. Lunny.)

Q. Following the torpedoing of the Absaroka what happened to her; did she sink?

A. No. She waterlogged and was towed in by salvage tugs.

Q. Towed in where?

A. Into Los Angeles Harbor.

Q. Was she beached there? A. Yes.

Q. Subsequent to that her cargo was discharged?

A. Yes. [19]

Q. The entire cargo? A. Yes.

Q. Was her damage as a result of the torpedoing extensive? A. Yes.

Q. I would like to show you, Mr. Lunny, what purport to be photographs of a vessel and ask you if you can recognize these as photographs which give us some idea as to the extent of the damage of that Absaroka.

A. Those are the photographs we had taken of the damage after she drydocked and was surveyed. Had she not had a full lumber cargo she would have been a total loss, because with the general cargo she would have sunk, but the lumber kept her afloat.

The Court: Was there more than one hole in the ship? A. Five.

The Court: It is a miracle she did not sink.

A. I beg your pardon. I thought you said holds.

The Court: H-o-l-e.

A. Oh, one. I thought you said h-o-l-d-s.

The Court: One hole in the side of the ship.

(Testimony of Joseph A. Lunny.)

A. Yes.

The Court: About the middle?

A. It was further aft of middle.

Mr. Charles: May I ask that those be introduced in evidence?

The Court: Yes. They may be admitted.

Mr. Charles: As Exhibit 1 of respondent, A, B, C, D, E, F, and G. [20]

The Court: Yes.

Mr. Charles: And to be applicable as the entire record is in both cases.

The Court: Very well.

(The photographs were marked Respondent's Exhibits 1-A to 1-G, inclusive.)

Mr. Charles: Q. You stated the cargo was discharged at San Pedro following a salvaging of the ship. Could you tell us whether the vessel was immediately repaired?

A. Well, the discharge was partly accomplished by lighters in the outer harbor of Los Angeles. Then the vessel was shifted up to the inner harbor and the major portion of the cargo was placed on the dock, there. Subsequently the vessel was drydocked for a survey to determine as near as possible the exact amount of damage. Then bids were called for to repair the damage.

Q. Was there any question at any time as to whether the ship would be repaired?

A. It was questionable in our minds until the amount of damage was actually determined.

(Testimony of Joseph A. Lunny.)

Q. The actual cost of repairs was approximately \$328,000; is that right? A. Yes.

Q. How old a ship was the Absaroka at that time? A. 24 years old.

Q. What type of ship was she?

A. What is known as the West Type vessel, a three-island deep water.

Q. Had those been ordinary peace times rather than war times [21] when the earning capacity and need of the ship was great, would there be any question in your mind as to whether she would have been repaired at all?

A. There would have been a grave question as to whether she would have been repaired or not.

Q. That \$328,000 cost of repairs, I understand that does not include the salvage expense and other costs of discharging and handling of the lumber?

A. That was solely the cost of repairing the ship in the yard.

Q. Could you give us, based upon your experience, a very rough estimate as to how long it would have taken to repair such damage as this under ordinary peacetime conditions?

A. Not to exceed 45 days.

Q. How long did the repairs to the Absaroka in fact take? A. 110 days.

Q. Her repairs were completed on May 9, 1942; is that correct? A. 9th or 11th.

Q. That was the date of the trial run; would that be any indication to you?

(Testimony of Joseph A. Lunny.)

A. Oh, she didn't immediately go to sea thereafter, but May 9th or 11th.

Q. Could you tell us what shipyard conditions were in the San Pedro area at the time the Absaroka was torpedoed, and during the next few months?

A. Well, naturally, immediately after Pearl Harbor considerable confusion existed in our industry; that would include confusion in the shipyards. We gave the [22] ship to Bethlehem with the definite understanding on their part that at any time the labor may be taken away from the ship and the ship would lie idle, or if the vessel was occupying a drydock they may have to put her in the water, and if something more urgent came along and if the Navy, or the Army, or the War Shipping Administration should tell Bethlehem that they had to repair, let's say, a tanker of the Navy or the Army, or a vessel in the War Shipping Administration Service that was more urgently needed than the Absaroka, the Absaroka repairs would cease and she would have had to lie idle until such a time as repairs were again started on the Absaroka.

Q. All the repair work at that time was being done on priorities?

A. In fact, it has all been done since that time. The Absaroka, in her very damaged condition at that time, certainly would be a ship that the repairs would have been deferred on with preference to a vessel that was actually engaged in war

(Testimony of Joseph A. Lunny.)

shipping if the vessel was more needed than she would be. Say a vessel that might handle troops or perishable cargoes, so while we had the estimate of the time from the shipyard, and while we were quite sure it would take longer than even the estimates, at least we didn't know at that time just how long that vessel would be in repairing, and it was for that reason we abandoned the voyage, because we could see satisfactorily with the information we then had at hand, we could not determine how long she would be in repairing, and we thought in the interest of the [23] cargo and all concerned it was best to abandon the voyage, which we did, and the firm then gave notice of abandonment of the voyage.

Q. That notice of abandonment was given on what date?

A. I believe about the 6th of February; I think the 6th.

Mr. Finney: February 5.

The Witness: February 5?

Mr. Charles: Q. You were at Wilmington about one or two times during the discharge of the Absaroka's cargo?

A. I was not there during the discharge, but we sent a man down from Portland who was very familiar with lumber handling, and our port engineer was there, and the man representing the underwriters of the cargo interests flew out from New York. It was the consensus of opinion of the cargo underwriters here, as well as the man

(Testimony of Joseph A. Lunny.)

who flew out from New York, that we should forthwith start disposing of that lumber, because if we had piled it up in the yard, which we eventually did, and let it rest there for a matter of months, lumber would deteriorate very quickly.

Q. You mean from the weather?

A. From the weather, and what we call burned piles, because we didn't have enough labor to pile the lumber up to protect it from burning. Obviously, the Coast Guard and the Navy were very apprehensive at that time of conditions in the harbor. They would only allow us to pile it so high, and the result of all this was that we would have had to pile this lumber piece to piece. If it had laid there [24] for months it would have burned, as we use the term.

The Court: Q. What do you mean, "burn?"

A. Well, actually it is a dry rot.

Q. From the sun?

A. No; because one piece is right against the other. This vessel, after having been torpedoed, mostly the lumber was wet. If you piled lumber piece to piece that is wet and leave it there for a matter of months, that is the condition that will exist. That is why you see in lumber yards when lumber is stored for a long time, the lumber is running this way, one tier of it, with one-inch by two-inch in between, and that is put there to allow the air to go through. The underwriters and ourselves, from our familiarity with the lumber business we knew, first of all, we didn't have the labor

(Testimony of Joseph A. Lunny.)

and, secondly, the Coast Guard would not permit the high piling, and, thirdly, the cost of it would have been excessive.

Mr. Charles: Q. What was the condition of the lumber upon discharge? Was the discharge made in the usual way, by lots?

A. It was impossible to discharge it except certain portions of the lot as the vessel was loaded; a lot was damaged with oil, a lot was damaged by salt water.

Q. Was any of the lumber oil-soaked?

A. A lot of it.

Q. You were down there prior to the time the Absaroka's repairs were completed, were you?

A. Yes.

Q. You had regular reports on the lumber from men serving you and men who were there on the ground? A. Yes. [25]

The Court: Q. What kind of lumber was it?

A. Douglas fir, green lumber.

Q. What develops further, would it warp after being wet?

A. Yes, your Honor. Whenever that Douglas fir or hemlock becomes soaking wet at any time in salt water and then exposed to the sun for a matter of months and months, it is very likely that a certain degree of shrinkage develops.

Q. You say that it will rapidly deteriorate?

A. No; I was thinking about over the course of months.

Q. How long?

(Testimony of Joseph A. Lunny.)

A. Three to six months. Of course, it would be hard to say just how long it would take, because that would depend upon the weather. You might run into a long hot spell, or you might run into rainy weather. It is difficult to determine just in so many days, in how many days this condition would come about.

Mr. Charles: Q. Well, it was, of course, approximately five months before the vessel's repairs were completed; you said in May of 1942?

A. Yes. I was thinking about the three to six months subsequent to the date of abandoning, which was in February.

Q. You determined upon a plan to sell the lumber on behalf of all concerned, did you?

A. Yes.

Q. Did you consult at all with the cargo owners, or their representatives, in determining whether the lumber should be sold, or what should be done with it?

A. Well, the determination to [26] sell the lumber really originated with the owners of the lumber.

Q. That is, the sale of the lumber?

A. Yes, the sale of the lumber. I know they urged the lumber be disposed of because no one could contemplate when the repairs could be completed, when the vessel could go on the voyage; if or when she was repaired whether she could go on the voyage at all.

Q. What charges were there running against

(Testimony of Joseph A. Lunny.)

the lumber during that period of time that it was on the dock, there?

A. The ordinary storage charges. May I qualify that? I said the ordinary storage charges. The ordinary storage charges plus the watching expense imposed upon us by the Coast Guard; because of the condition of the lumber, being oil-stained, they considered it a fire hazard and they asked us to get it out of the way as soon as we could.

Q. Am I correct in understanding you stored it as agents for the cargo owners? A. Yes.

Mr. Charles: I might say, in fairness, that we are not making the contention that they waived anything by reason of an agreement that the lumber be stored, but we simply want to point that out to give your Honor the background of this as it fits into the reasonableness of the company's decision to terminate the voyage.

Q. You sold the lumber as agent for the cargo owners. What was done with the proceeds?

A. The proceeds were forwarded to the owners of the lumber. [27]

Q. Was that done directly, do you recall, or do you recall whether it was done through the adjusters?

A. I don't recall. I believe it was done direct, but I won't be so sure.

Q. You deducted your freight from those proceeds? A. Yes.

Q. Was any of the lumber lost overboard, Mr. Lunny, at the time of the torpedoing?

(Testimony of Joseph A. Lunny.)

A. Yes.

Q. You mentioned a moment ago that you were not even certain that the voyage could be completed after the ship had been repaired. I wonder if you would state to the Court what you had in mind at that time in that connection.

A. Well, there were no other intercoastal voyages being at that time undertaken. The Government directed vessels into other more essential routes, and while there was no advice from the Government to us at the time we abandoned the voyage that she was wanted for that service, or that she was requisitioned for their service, we felt reasonably certain that the vessel would be ordered by the Government to go in some other direction other than intercoastal. No one could say what the condition would be at the time she was repaired. She may well have continued on her voyage.

Q. Immediately prior to the time you made your decision to terminate the voyage at San Pedro, was there any information that you had, or the public had, which indicated to you that there was any justification in the prosecution of the remainder of the intercoastal voyage from submarines?

A. Definitely. [28]

Q. That was February 5, 1942. The Japanese submarines had been on the Pacific Coast, of course, about the time of the torpedoing of the Absaroka?

A. Exactly at the time.

(Testimony of Joseph A. Lunny.)

Q. And other vessels had been torpedoed, too, is that correct? A. That is right.

Q. Completion of the intercoastal voyage would mean going through the Canal, wouldn't it?

A. Yes.

Q. Then the ship would go on through the Caribbean, along the Atlantic Coast, to her point of destination, New York, and other ports?

A. Yes.

Q. Do you know whether there were any German submarine activities in the Caribbean and on the Atlantic Coast up to that time?

A. The worst menace from submarines at that time was in the Caribbean. On the Pacific Coast, of course, as you say, we had the Japanese menace on the whole Pacific Coast, and on the whole Atlantic there was the German menace, but the Caribbean was the worst. We knew of a vessel that late in January was on her way to Trinidad, and was diverted to San Jose for reasons best known to the Navy. Then we had knowledge that at the time it was overdue at San Jose, and has never been heard from since. I don't think there is any question about the menace, at all, of submarines at that time, because there were too many sinkings, especially in that territory between the Panama Canal and the North Atlantic.

Q. Do you know whether there was any convoying of vessels in [29] any trade in which the American vessels were engaged in the two or three months that followed Pearl Harbor?

(Testimony of Joseph A. Lunny.)

A. There was conveying in certain directions. I am not fully familiar with all of the convoys that were undertaken, naturally I would not be, but it is more than reasonable to assume if the Absaroka started out from Los Angeles on her own that she would not have a convoy all the way to New York.

Q. Did you have any reason to believe at the time you made the decision to terminate the voyage that there would or would not be a convoy available when the Absaroka completed repairs?

A. My definite determination was there would not be a convoy, because there was no convoy for the steamer when the West Ives was lost in the Atlantic.

Q. What official of your company made the decision to terminate the voyage of the Absaroka at Wilmington? A. I did.

Q. Did you consult with the master of the ship at all? A. I did.

Q. What was the master's name?

A. Prendel.

Q. Will you state briefly, although I think you have possibly mentioned them all, upon what considerations you based your decision to terminate the voyage?

A. Based on the fact that at the time the known date when the vessel would be ready to complete her voyage was a matter of considerable conjecture, but to our way of thinking it could well be a matter of months and months, and we then aban-

(Testimony of Joseph A. Lunny.)

doned the voyage and reserved to [30] ourselves all the rights under the bills of lading.

Mr. Charles: I think that is all.

Cross-Examination

Mr. Finney: Q. When was the lumber sold, Mr. Lunny?

A. The lumber on board the Absaroka?

Q. Yes. When was the lumber cargo of the Absaroka sold?

A. Well, it was five million feet of lumber on board. I suppose it was sold on various dates. I wouldn't know the exact date each lot was sold.

Q. Well, do you know over what period of time?

A. No, I don't know.

Q. Do you know when the first sale was made?

A. No, I don't, but the records will show, and we could produce those if you want them.

Q. It was about February 5, 1942?

A. I beg your pardon. I thought you meant originally sold.

Q. Oh, no, no. I mean after the torpedoing.

A. To the best of my knowledge, none was sold until the voyage was actually abandoned.

Q. It was after that?

A. I misunderstood. I thought you meant the original sale from the mill.

Q. The determination to sell the lumber was made about February 5, 1942, and it was actually sold after February 5, 1942? A. That's right.

Q. On that date you had no advice, you say,

(Testimony of Joseph A. Lunny.)

from the Government, [31] that they would want to take the Absaroka into Government service?

A. That's right.

Q. It was not a troopship or a ship that was vitally needed at that time?

A. No, she was not vitally needed at that time, to the best of my knowledge; at least, we had no advice they wanted the vessel. Of course, I must say after they took her they realized how good she really was, and because of the peculiar rigging of the vessel, being the only one on the West Coast, in this country, which carried more piles than any other five vessels put together.

Q. She was primarily a lumber ship?

A. Yes.

The Court: What was there about her that was different?

A. Well, when we bought her I put four masts on her. She was able to carry long piling, that is just what Pearl Harbor needed. She is running there yet.

Mr. Finney: Q. You chartered her to the Government about May 9, after she was repaired?

A. We had notice of intention to charter prior to that time.

Q. Was she requisitioned or chartered to the Government after May 9th or on May 9th?

A. The wire received at that time was like a lot of other wires received at that time. It could be considered to mean either an offer to charter or a requisition.

(Testimony of Joseph A. Lunny.)

Q. That you received some time in April—it was dated April 14th, wasn't it?

A. I believe it was thereabouts, but I don't know yet whether it was a requisition wire or an offer to charter. [32]

Mr. Finney: The pre-trial order covers that, your Honor.

The Court: Yes.

Mr. Finney: The wire is in evidence.

Q. Were there German submarines operating in the Caribbean—you say that was the worst danger along about this time?

A. Yes, it was, because they were torpedoing tankers out of the Gulf and they were supplying, or trying to supply the vessels coming up with bauxite, from which they make aluminum.

Q. That did not apply only to vessels of the United States, but it applied to English, French, Norwegian, Greek, or any other vessels that were in those waters?

A. I don't know how selective they were in their sinkings—I don't mean to be facetious, but they had their own ideas as to who they were going to sink.

Q. What I mean is, Germany was at war with England and France before we ever entered the war.

A. As to England and France, I will say positively, yes, but I don't know as to Greeks or any others.

Q. Well, confine it to English and French, and

(Testimony of Joseph A. Lunny.)

you would say there was a submarine campaign in the Atlantic Ocean before we were in the war, against the English and the French? A. Yes.

Q. A great number of English ships and French ships were lost in the Atlantic before we were in the war? A. Yes. [33]

Q. And in the Caribbean, too?

A. I don't know about in the Caribbean before the war.

Q. You were in the shipping business, you were watching the shipping situation during all this time, weren't you? A. Yes.

Q. Do you have any idea of the British ships lost say during 1941 before we were in the war?

A. No. We have a mass of figures in our office but I haven't got the figures in my head right now. I do know this, I don't know whether it would be helpful in the questioning or helpful in the answers to the questions, but up until the time we engaged in the war I do know our vessels ran down through the Caribbean and ran back that way and never were harmed until Pearl Harbor. In other words, we took vessels out of the intercoastal trade and sent them down through there and they carried essential cargo there and brought home linseed, and they never were bothered on that route. The West Ives was the first occurrence after Pearl Harbor.

Q. Prior to Pearl Harbor there hadn't been any one that had been intentionally torpedoed—I mean of our ships—before December 7th?

(Testimony of Joseph A. Lunny.)

A. I was just saying there were not, to the best of my knowledge. I knew of no cargo ship that was torpedoed.

Q. You say after Pearl Harbor, that was when you began to take precautions and expected torpedoing?

A. Yes. We placed war risk as to everything we had on the morning of Pearl Harbor. At ten o'clock in the morning from home I placed war risk insurance [34] on every vessel we had, and the cargoes they had.

Q. What?

A. Carried war risk insurance, I placed war risk insurance.

Q. Were there British tankers operating in the Caribbean before December 7, 1941, or French?

A. I don't know.

Q. You don't know whether there were any losses before that?

A. British or French, I don't know.

Q. You do know that on the Atlantic, though, before we were in the war, before December 7th, that is, without knowing the exact figure, you know there was a torpedo boat campaign in the Atlantic?

A. Yes. The only reason I said I didn't know about the Gulf is because you said tankers. I can't say British or French tankers. I would say British and French ships in the Gulf, or in the Caribbean, would be as much subject to attack there as in the Atlantic. You asked if I know of any tankers. I didn't know of any tankers specifically.

(Testimony of Joseph A. Lunny.)

Q. But ships generally, you did know that in the Caribbean and in the Atlantic before we were in the war? A. Yes.

Q. Being torpedoed? A. Yes.

Mr. Finney: That is all.

Redirect Examination

Mr. Charles: I want to ask one or two questions. You were questioned, Mr. Lunny, regarding whether your ship was requisitioned or whether she was chartered, and you said you were somewhat uncertain as to whether she was being chartered [35] or requisitioned. I want to show you a wire, copy of a wire dated April 14, 1942, addressed by the War Shipping Administration to the McCormick Steamship Co.

Mr. Finney: Isn't that the one in evidence?

Mr. Charles: That is the one in evidence.

Q. I ask you if you would read that wire to the Court:

A. "The War Shipping Administration requires use of your vessel SS. Absaroka and offers to charter the same for about one year with option in either party to cancel at termination of any voyage of fifteen days prior written notice stop Charter hire to be determined in accordance with Maritime Commission General Order Number Forty-nine and in reliance on vessel data information supplied by you stop Trading limits to be worldwide but marine insurance within limits of American institute trade warranties March Nineteen

(Testimony of Joseph A. Lunny.)

Forty Two stop However have your marine policies provide automatically help covered for worldwide trading premiums for trading beyond such limits account administrator stop Insurance values to be in accordance with Maritime Commission General Order Number Fifty Three plus actual value consumable stores and supplies stop Delivery Los Angeles April when ready after completion repairs redelivery at US Pacific Coast port formal charter agreement covering foregoing will be mailed shortly shortly stop Charter rates prescribed by [36] General Order Forty Nine and insurance values prescribed by General Order Fifty Three now being reviewed stop If such rates or values are modified on or before April Fifteen you shall have the election of receiving the benefit of such modifications stop Form of time charter following form published in Administrators General Order Number One with certain modifications now being prepared stop If charter tendered you or rates or valuations therein prescribed is not satisfactory and you so advise us within ten days of receipt thereof we shall proceed under section nine zero two or take over the vessel as of time of delivery."

The only reason why I said I did not know whether that was an offer to charter or requisition was simply because their terms are silent and it says in the bottom part of the wire that if when we get the charter we don't like it, they will requisition the ship. All I say is, at the time of receiving the wire I did not know whether it was

(Testimony of Joseph A. Lunny.)

an offer to charter or whether it would ultimately result in an offer to charter, or a requisition, and in some respects I don't know how, because when it comes to re-negotiating, they are talking about a requisition or a voluntary charter.

Q. Is the section referred to here the one that gives the Government the power to requisition ships and to pay just compensation?

A. When the President declared a national emergency [37] to exist, they might either through purchase or charter requisition your property at an agreed value, or at an agreed rate, or failing to agree as to the value and rate to requisition and pay you just compensation.

Q. You mentioned the shipments that were made in this case were collect freight shipments. Can you tell us whether that was a common practice of your company to ship with freight collect, that is, freight payable at destination?

A. It is very common practice in our company as well as all the intercoastal trade. It was also common with the lumber trade. The fact of the matter is it was so common it became a burden at one time. The carrier would accept the lumber at the mill and carry the lumber to the East under bill of lading like ours, or substantially like ours, and drop the lumber on the dock, and, naturally, the carrier wouldn't surrender the lumber until the man produced the bill of lading.

When the market for lumber became very dull, we would ship to some consignee, such as these

(Testimony of Joseph A. Lunny.)

people here, who are in court now, and they would pay for the price of the lumber at the mill. We sent a bill of lading and they wouldn't go down to pick the lumber up for maybe three or four months while they were negotiating the sale to somebody else, so the steamer lines were out their freight money for a matter of months and months, and it was really a serious situation as far as lumber, because it was the only cargo in the trade that was handled that way. [38] We had other shipments west on the same bills of lading where we considered the freight was earned, and we did not collect until we came out here. Naturally, if a man had some radios in a cargo, for instance, he would come down and pay the bill and take his radios, or any other cargo, but with lumber being a commodity that it is, and was susceptible to a number of transfers between the shipment from the mill and the ultimate user of the lumber, it offered of delay in ultimate delivery. For instance, Blanchard may have bought the lumber and taken his documents, and he may have sold it to the man across the street, who might sell to the man down the street, and the man who gets the bill of lading was the man who packed the lumber off the dock. Storage rates were low at this particular dock in New York, I think Sixty-fifth street dock at Brooklyn. I should say, taking all that into consideration, it was a very common practice.

Q. In your judgment, if you had insisted, your company insisted upon getting all the freight pre-

(Testimony of Joseph A. Lunny.)

paid, would that have had any effect upon your competitive position in the industry?

A. It would, because the other lines were not demanding that the freight on lumber be prepaid. For instance, our lumber division, we sold lumber and shipped it out on other lines—I don't recall the lines now, but I know them all. We used American-Hawaiian and other lines. They did not demand advance on the freight. They carried under the same conditions [39] as we did. I say "we". I mean our steamship division carried it for the lumber division, not exactly the same bill of lading, but with the same option in it as to when the freight was payable, but in our estimation there was no question about when it was earned.

Mr. Charles: I think that is all.

Mr. Finney: That is all.

(A recess was thereupon taken until 2:00 o'clock p.m.) [40]

Afternoon Session, April 27, 1945, 2 p.m.

GEORGE KENDRICK,

called as a witness by respondent and defendant;
sworn.

The Clerk: Will you state your name?

A. George Kendrick.

Direct Examination

Mr. Charles: Q. Mr. Kendrick, in what capacity are you employed with Pope & Talbot?

(Testimony of George Kendrick.)

A. District sales manager and manager of the lumber division.

Q. Were you employed in a similar capacity in December, 1941? A. I was.

Q. Have you had experience in the sale of lumber, and in the company's lumber operations?

A. Yes.

Q. That extends over some years?

A. About 20.

Q. Are you familiar with the Pacific Coast lumber practices? A. Yes.

Q. Was it a common practice in 1941 to handle sales of lumber and to transport the lumber in the manner in which the shipments here in suit were handled? A. That's right.

Q. Was it a common practice when Pope & Talbot sold lumber to a New York purchaser for the purchaser to pay the mill price, rather, to draw a draft for the mill price and then for Pope & Talbot to arrange the transportation of that lumber on its own vessel, with the freight paid upon arrival of the goods? A. Yes. [41]

Q. I wonder if you would explain to us the basis upon which lumber was sold by your company.

A. Well, in the intercoastal trade there are three methods of selling, FAS vessel mill, free alongside vessel at the mill; C&F, cost and freight; and CIF, cost, insurance and freight. It is generally recognized in the trade, and according to the West Coast

(Testimony of George Kendrick.)

terms of sale, and even those who sell C&F, the price basis is FAS.

Q. Could you explain what you mean by that?

A. Well, the industry at that time was operating under a basic price list. That is a price list put out by the Intercoastal Lumber Distributors' Association and the West Coast Lumbermen's Association, which is the association of the manufacturers in the case of the West Coast, and an association of the distributors in the case of the Intercoastal Lumber Distributors' Association. The terms of sale, the general practices of those two associations were carried on by practically the entire industry.

Q. Now, you have West Coast Distributors' Association—is that the name of it?

A. Intercoastal.

Q. Intercoastal Lumber Distributors' Association; is that made up of just the carriers, or does that include the wholesaler in the West?

A. That is made up only of the distributors who manufacture and sell in the Atlantic seaboard country. It has nothing to do with the carriers.

Q. You referred to a document establishing uniform terms of sale. What do you call that document?

A. That is the West [42] Coast terms and conditions of sale, which is the industry's basic terms and conditions of sale, and covers all phases of lumber distribution.

Q. Is that a published document?

A. Yes, it is.

(Testimony of George Kendrick.)

Q. Can you tell us how that is distributed?

A. Well, it is available to anyone within the industry, or anyone that is interested in the marketing of lumber, and can be secured from the West Coast Lumbermen's Association.

Q. Does that provide for uniform terms of sale?

A. Yes.

Q. Do you have another copy of that with you, Mr. Kendrick?

A. Yes, I have.

Q. I would like to show you a document entitled, "Official West Coast Standard Sales and Shipping Practices for Douglas Fir, West Coast Hemlock, Western Red Cedar and Sitka Spruce Lumber," which is dated October 15, 1940, and states it is "Published and Distributed by West Coast Lumbermen's Association," and ask you if that is the document to which you are referring.

A. That's right.

Q. You say that has a wide distribution?

A. Yes.

Q. This West Coast Lumbermen's Association, was your company a member of that association?

A. Yes.

Q. Do you know whether the Blanchard Lumber Company is a member of this association?

A. Not of the West Coast Lumbermen's Association.

Q. Do you know if it was a member of the other association you [43] mentioned?

A. They were; I understand they are members

(Testimony of George Kendrick.)

of the Intercoastal Lumber Distributors' Association.

Q. How about the Guernsey-Westbrook Company? A. I understand they are, also.

Q. The last of the associations?

A. The Lumber Distributors' Association.

Q. Do you know whether this is in common use among the people who purchase lumber from your company? A. Yes, it is.

Q. I want to ask you whether there are any provisions in these West Coast terms having to do with shipments comparable to the shipments which are in suit here.

A. I think you will find it in paragraph J under "Water Shipments." Water shipments are all covered——

"All sales of West Coast stock, where prices include cost of delivery, are made FAS plus freight and/or other charges in effect when sale is made."

Q. Can you tell us whether there was any reference there to the bill of lading?

A. Paragraph J specifies:

"All terms and provisions of ocean steamship bill of lading are assumed by buyer in acceptance of bill of lading covering shipment."

Under paragraph I it is also specified that,

"Any taxes, State or Federal, levied or assessed on account of freight charges, or any increase in freight rates or other delivery costs as published by the Intercoastal [44] Steamship Freight Association, the Pacific Lumber Carriers' Association,

(Testimony of George Kendrick.)

the Gulf Intercoastal Conference, or any other common carrier," and so forth.

Mr. Charles: I should like to offer this document in evidence as Respondent and Defendant's Exhibit 2.

In making this offer, I wish to make it clear, however, that it is our contention that the terms under which these sales were made and the forms of the orders which were used have, in our judgment, no bearing upon the issues involved here, because of the fact that the bills of lading and the bills of lading provisions alone are controlling, but the contention has been raised and we therefore wish to offer this in evidence.

Mr. Finney: I will object upon the ground it is incompetent, irrelevant, immaterial, and not binding on the parties we represent. That would be incompetent to vary the terms of the contracts that were made in this particular case.

The Court: Well, I don't suppose these are offered for the purpose of establishing a contract. You did not offer it for any such purpose?

Mr. Charles: No.

The Court: You are offering it merely to show the circumstances surrounding the entire transaction?

Mr. Charles: Yes, that is correct, and for the further purpose of showing the terms of the carrier's bill of lading [45] are supposed to apply to all shipments, regardless of character.

The Court: Mr. Finney, I am unable to see

(Testimony of George Kendrick.)

clearly how I could sustain or overrule your objection. Perhaps I had better permit it to be marked as an exhibit, reserving my ruling upon it.

Mr. Finney: I would think so, your Honor.

The Court: Until I decide the case.

Mr. Finney: I would think so. I understood the statement was it was offered for the purpose of showing that the orders and acceptances and the documents we rely on had no bearing on this transaction. From that statement I take it that it is being offered to vary the terms of the contracts involved here. I think your Honor's suggestion is a good one about reserving the ruling.

The Court: Yes.

Mr. Charles: That will be agreeable.

The Court: Let that be the understanding. I suppose when the reporter will finish taking this testimony he will transcribe it for the use of the Court?

Mr. Charles: Yes.

Mr. Finney: Yes, surely, your Honor.

Mr. Charles: We will be pleased to do that.

(The document was marked Respondent and Defendant's Exhibit 2.)

Mr. Charles: Q. Mr. Kendrick, when sales are made by [46] Pope & Talbot of lumber, what is the basic price upon which the transaction is made?

A. The FAS mill price, or FOB carrier mill price.

Q. What is the mill price; is that the sale price of the lumber at the mill? A. Yes.

(Testimony of George Kendrick.)

Q. Is that price a price which is established by any publications that are distributed to the trade?

A. Well, essentially it is controlled by OPA regulations.

Q. With reference to December, 1941, did you have any established price?

A. We had an established basic price.

Q. What was that basic price?

A. That was the basic price that was formulated by the Intercoastal Lumber Distributors' Association and the West Coast Lumbermen's Association.

Q. Did all of the lumber manufacturers charge the same price, mill price?

A. No. They used the same pricing formula; in other words, if the basic price was \$27, some mills were over the price and some were under the price. There was no firm price with all the mills, but there was a firm formula that they all used.

Q. What was that formula?

A. It was the Atlantic Coast Differential list.

Q. If you wanted to determine what your selling price was of lumber which was moving to New York, how would you apply that basic formula, how would that apply to the determination of the sales price?

A. If we have to make the price you would [47] use the firm price list, firm basic list, take the basic list for each grade and size and length, add your

(Testimony of George Kendrick.)

freight charges, and in case where it was a CIF sale, add your insurance charge, or any other forwarding charge.

Q. Could one also determine what the price would be for lumber that is sold for delivery in Los Angeles, or sold for delivery in New York, or New Orleans by taking the basic mill price and then adding the freight to it? A. Yes.

Q. What is this price list called?

A. Atlantic Coast Differentials.

Q. This document which is compiled and distributed jointly by the Intercoastal Lumber Distributors' Association and the West Coast Lumbermen's Association—is it? A. Yes.

Q. And this document, dated September 1, 1939, was that in effect in December, 1941?

A. Yes, that's right.

Q. This Intercoastal Lumber Distributors' Association, is that the one which you mentioned that Guernsey-Westbrook and Blanchard belong to?

A. That's right.

Q. Do you know whether this document was widely distributed and used among lumber dealers, wholesalers, in December, 1941?

A. On the Atlantic Coast, yes.

Mr. Charles: I should like to make a similar offer of this document in evidence.

The Court: Very well.

Mr. Charles: For the purpose previously stated.

The Court: It may be admitted upon the same

(Testimony of George Kendrick.)

understanding that the other document was admitted, and upon the same objection.

Mr. Finney: Yes, your Honor.

The Court: The ruling will be reserved.

Mr. Charles: That will be Respondent's No. 3 in one case and Defendant's No. 3 in the other.

(The document was marked Respondent and Defendant's Exhibit No. 3 in evidence.)

Mr. Charles: Q. Mr. Kendrick, in view of what you have said, if your vessel was to carry lumber to Los Angeles and discharge it there, would that lumber have a higher value in Los Angeles than at the mill? A. Yes.

Q. If you contracted to carry lumber to New York and you carried it to Los Angeles and deposited it under ordinary conditions would the value of that lumber be higher than it would have been at the mill? A. Yes.

Q. But it would be lower, or less valuable than at New York? A. That's right.

Q. You are familiar with the documents which are ordinarily used in connection with a purchase of lumber from your company, are you?

A. Yes, sir.

Q. Now, if, as was the case of some of these shipments, an order bill of lading is obtained, or a draft and an order bill of lading was obtained by Guernsey-Westbrook from you, and the [49] bill of lading negotiated by Guernsey-Westbrook to another party, would that other party receive the Pope & Talbot order form, or acceptance of order form?

(Testimony of George Kendrick.)

A. No.

Q. What document would he receive?

A. He would receive a Guernsey-Westbrook invoice and the bill of lading, which would be endorsed over to him by Guernsey-Westbrook, or Blanchard, or anyone else in the trade.

Q. Would that bill of lading, if the freight was collect, as here, would that bill of lading carry some indication that the freight was collect?

A. I did not quite understand that question.

The Court: Read it.

(Question read.)

A. Yes, it would.

Mr. Charles: Q. It would show whether it was prepaid or collect? A. Yes.

Q. From your background in the handling and sale of lumber I should like to ask you whether the form of sale that is made CIF or FAS, or any other form, has anything to do with the question as to whether the freight is earned freight, whether the freight is subject to an earned freight clause or not?

A. Well, as far as the sales are concerned, it would not, other than the provisions, other than the stipulations in the bill of lading.

Q. The provisions of the bill of lading, in your judgment, would cover? A. That's right.

Q. Was Pope & Talbot a member of any steamship conference in December, 1941?

A. McCormick Steamship Division of Pope & Talbot, yes.

(Testimony of George Kendrick.)

Q. Pope & Talbot is one corporation.

A. Yes.

Q. You are referring to one division of that company? A. Yes.

Q. Did that Intercoastal Conference have any uniform practice with respect to the lumber business? A. Yes, they did.

Q. Do you know from your experience whether the other companies carried their shipments on substantially the same basis?

A. The majority of them did, yes.

Q. Do you know from your experience whether other companies had earned freight clauses in their bills of lading?

A. Yes; I have seen other steamship bills of lading that use it. There is the Intercoastal Freight Association.

Q. Was lumber carried on a collect freight basis very often?

A. I think it was the practice of the trade at that time.

The Court: How long had that practice existed?

A. Many years.

The Court: Ten years?

A. Yes; to my knowledge longer than that. It was a desirable way with the dealer assisting his financing by having the freight, which in some instances was a sizable part of the delivery price, carried by someone other than himself or his banking connection.

Mr. Charles: Q. That is, if a man had \$100,000

(Testimony of George Kendrick.)

to deal with and he could purchase lumber and not have to pay the very [51] substantial freight on it at that time, he could buy that much more lumber?

A. Yes.

Q. Was that the reason why they did it?

A. Generally, yes.

Q. In some cases did you sell lumber and was arrangement made to ship or forward it on some other steamship line independent of Pope & Talbot?

A. Yes.

Q. If a purchase was made by you of lumber to be shipped on the American-Hawaiian ship would the freight be prepaid or collect, do you know?

A. Generally it would be collect.

Mr. Charles: That is all.

Cross-Examination

Mr. Finney: Not knowing what the Court's ruling will be ultimately on them, I would like to bring out one other clause—I think that document generally was introduced.

The Court: Yes; that is what I understood.

Mr. Finney: This clause E, Mr. Kendrick:

“(General: Applies to all sales.) Freight and/or other forwarding charges are net cash and payable by consignee upon arrival.”

That was the uniform practice, was it?

A. Yes.

Q. You said under your practice at the time the gross sales price, that is the price delivered in New York, included a base price at the mill, plus the freight—is that it?

(Testimony of George Kendrick.)

A. Plus the freight, or plus the freight and insurance.

Q. Yes. Lumber, you say, was more valuable in New York than [52] Los Angeles? A. Yes.

Q. That is the reason why you paid the freight, to get it there? A. That's right.

Q. And it was uniform practice to send the lumber, or make the bill of lading, or make the contract with the freight collect upon arrival of the lumber at destination? A. Right.

Q. The reason you say for that was that he, the purchaser of the lumber, did not have to pay the freight until he received the lumber; in other words, he was not out the freight until the lumber was delivered to him? A. That is what I mean, yes.

Mr. Finney: That is all.

The Court: Is that all, Mr. Charles?

Mr. Charles: I would like to ask just one question of Mr. Lunny, if I may.

JOSEPH A. LUNNY,

recalled as a witness by Respondent and Defendant, having been previously sworn, testified as follows:

Direct Examination

Mr. Charles: Q. Mr. Lunny, you have called my attention to the fact, I believe you said that under some circumstances the market value of the lumber at New York might not be more than the

(Testimony of Joseph A. Lunny.)

market value at Los Angeles. I wonder if you would explain that.

A. Well, I did not think that the answer was as clear as it might be, in that the freight rate governing any [53] particular shipment of lumber would not necessarily make, or affect the value of the lumber. It would be the competitive conditions existing at the time. In other words, when the Los Angeles building boom was on the freight rate was higher to Los Angeles; that, plus the fact it was harder to get space to Los Angeles makes the value of the lumber at Los Angeles more expensive than the lumber at New York. That condition may well prevail throughout the country. The only point I had in mind is the freight rate does not necessarily make the value of the lumber higher or lower.

Q. The general price applies, the price is arrived at by the formula explained by Mr. Kendrick—that is, the mill price plus the freight?

A. The mill price applies when shipment was made, but in New York you may have competition from other lumber there.

Q. That would give you a different basic price, say for Southern pine or some other lumber?

A. Yes. Then the freight rate may vary on intercoastal lines, as well as on coastwise lines based upon the amount of lumber available for shipment to respective ports.

Q. Can you tell us whether the form in which the sale is made has anything to do with whether

(Testimony of Joseph A. Lunny.)

the freight is to be deemed earned, under the provisions of your bills of lading?

A. None, whatsoever.

Mr. Charles: I think that is all. [54]

Mr. Charles: If the Court please, I was going to call Mr. Hays, who is here, the average adjuster who made the average adjustments in this case, for the purpose of establishing the amount of lumber, or the amount of freight applicable to the lumber which was lost overboard at the time, or immediately after the torpedoing, and which is an amount that should be deducted from the amount claimed in the suit; that is, suit was brought for full freight—Will you stipulate that the claim should not include the freight on lumber that was lost overboard? Am I correct?

Mr. Finney: On our theory, it wouldn't make any difference whether the lumber was lost overboard or not carried. I will stipulate with you on the figure that it should be.

Mr. Charles: Yes. Well, may I call Mr. Hays to give us the figures?

The Court: Yes.

Mr. Finney: I will stipulate, but not as to the effect.

WALTER G. HAYS

called as a witness by Respondent and Defendant;
sworn.

The Clerk: Will you state your name to the Court?

A. Walter G. Hays.

Direct Examination

Mr. Charles: Q. Mr. Hays, you are employed by Marsh & McLennan, insurance brokers, and average adjusters, are you? [55] A. Yes.

Q. Were you so employed in December, 1941?

A. Yes.

Q. Did you have anything to do with the handling of the adjustments on the steamship Absaroka following her torpedoing on December 24, 1941?

A. Yes. I prepared the general average adjustments or general average losses arising from that casualty.

Q. Did you have any occasion at that time to make any determination as to the amount of freight which was applicable to the lumber which was lost overboard, or estimated to be lost overboard at the time of the torpedoing?

A. Yes. In our general computations and allocation of the proceeds realized from the sale of the lumber we computed the shortage and allocated the shortage to the various shipments as originally made, and at one time we did compute the freight that would be applicable to that shortage.

(Testimony of Walter G. Hays.)

Q. Could you give us the figure on the amount of the freight that would relate to the lumber that was lost overboard?

A. You mean the freight on the shipments by Guernsey-Westbrook Lumber Company and Blanchard Lumber Company, only?

Q. That is correct.

A. The freight on the shortage on the shipment to Guernsey-Westbrook Lumber Company would amount to \$937.25, and on the shipment by Blanchard Lumber Company, \$26.59.

Q. That is all with that, is it? A. Yes.

Q. Did you have anything to do with the problem concerning the [56] handling of the lumber following its discharge at Wilmington?

A. Yes. There was a considerable problem there because all the lumber had to be discharged from the Absaroka and the cargo underwriters and owners were interested in realizing the greatest possible amount from the sale of the lumber. In order to do so, it was necessary that I formulate some idea as to the amount of various specifications and grades that would be available. We prepared a list of the various amounts of different specifications and grades and the probable out-turn condition, based upon documents that were placed in our hands by Pope & Talbot, and assisted generally the surveyors and Pope & Talbot in the sale of the damaged lumber at Los Angeles.

Q. Did you have any dealings with a surveyor

(Testimony of Walter G. Hays.)

that came out from New York, to which reference was previously made?

A. Mr. C. N. Banghart, of the firm of Koehler, Camp & Koehler, of New York, came out here as a representative of the War Risk Reinsurance Exchange, and in conjunction with him we worked out these lists showing the totals collected from various specifications and grades that were out-turned, yes.

Q. Were there any particular difficulties involved in the disposition of the lumber that you had not ordinarily been confronted with?

A. Of course, I had nothing to do with the actual sale of the lumber. That was handled by Pope & Talbot. I was aware of certain difficulties, yes. All the lumber from the after hold of the ship was badly oil-stained. There [57] was some difficulty in disposing of that. There was difficulty involved in this way, in that the cargo could not be sold by original lots, because the purchaser in Los Angeles territory would naturally not have the same desire or demand for lumber as the original purchaser on the East Coast. So it was necessary to consolidate lumber of the same description, same grade, same specifications from various different original lots in order to make up a lot that could be sold to anybody in the Los Angeles territory.

Q. Did you make up a rough average statement in connection with different lots? A. Yes.

Q. Your general average statement would reflect

(Testimony of Walter G. Hays.)

the charges against the carrier, such as the storage charges and other items?

A. The general average statement shows all the handling charges and storage charges, yes.

Mr. Charles: I think that is all.

Cross-Examination

Mr. Finney: Q. Do you know when the last of the lumber was sold? Would you have that?

A. I have it in other records. It was sold toward the latter part of May.

Q. That was sold in Los Angeles?

A. Yes. The sales of the lumber were completed—the figure that runs in my head is something like 152 different transactions.

The Court: Q. You mean different lots?

A. That's right. [58]

Q. Why was it broken up in different lots? Was it sold at the best advantage in that way?

A. That's right. It had to be segregated as to different conditions. The oil-stained lumber would bring a very low price. There was a relatively small amount there that was practically sound. The Pope & Talbot people tried to sell the badly damaged along with the good lumber where they could do so, to increase the overall result.

Redirect Examination

Mr. Charles: I want to ask one question which refers to the examination of the other witnesses. I think Mr. Hays knows the fact.

Q. Do you know whether Pope & Talbot has a lumber yard of their own at Wilmington?

(Testimony of Walter G. Hays.)

A. I believe that was one of the main reasons that the cargo owners were willing and anxious to have Pope & Talbot sell the lumber, because all the lumber was actually delivered into Pope & Talbot's own yard, or yards in their control, and from which there were customers to sell and dispose of the lumber to.

Q. Do you know whether they had sales facilities in Wilmington, too?

A. Yes; they have a sales organization in Los Angeles which handled all the sales in this case.

Mr. Charles: That is all.

Recross Examination

Mr. Finney: Q. This lumber of Guernsey-Westbrook and Blanchard that is involved in this case was only a small portion [59] of the whole ship-load; Pope & Talbot had a lot of their own lumber on the vessel, too? A. Yes.

Q. Other people's, too?

A. Yes. I understand Pope & Talbot supplied all the lumber. They had some lumber on her, but other shipments had been sold by Pope & Talbot to other purchasers East.

Mr. Charles: If the Court please, we have no further testimony to offer, and I assume that your Honor will permit us to file memoranda of authorities?

The Court: Yes. Mr. Finney, you have the laboring oar.

Mr. Finney: Before we fix the time for the briefs, I was wondering if—it is a little late, but

(Testimony of Walter G. Hays.)

it worries my associate—I should perhaps technically have objected to a question that was asked both of Mr. Kendrick and then again from Mr. Lunny, as to whether or not the terms of the contract, that is, whether it was CIF or otherwise, in any way had any bearing on whether the freight was earned or not. The testimony is obviously parole evidence attempting to vary the written terms of the contract. I did not object, on the theory that I thought the Court would ignore the evidence if it was not material, after examining the contracts, and I think that is the basis your Honor goes on.

The Court: Well, that would be my understanding.

Mr. Finney: Yes. [60]

Mr. Charles: I would have no objection if Mr. Finney wishes to deem the objection made at the time.

The Court: Yes. Let that be the understanding. I think you have expressed it clearly, Mr. Finney. If the Court concludes that the evidence is immaterial, why, it will not be considered for any purpose.

(Discussion regarding briefs.)

Mr. Charles: I wonder if it might be possible for me to recall Mr. Kendrick to ask him one question?

The Court: You have no objection, Mr. Finney?

Mr. Finney: No objection.

GEORGE KENDRICK,

recalled as a witness by Respondent and Defendant, having been previously sworn, testified as follows:

Direct Examination

Mr. Charles: Q. Mr. Kendrick, I wanted to ask you about the meaning of the term "CIF". I wanted to know whether that means that you pay the freight, or what the meaning is, as it is used in your trade practice?

A. We don't understand it means we pay the freight.

Mr. Finney: Will my objection go to this?

The Court: Yes. I think that was all explained in the document, itself. Isn't it contained in the document, itself?

Mr. Charles: Yes, there is a definition of CIF.

The Court: Isn't that sufficient to show the court what it means?

Mr. Charles: Q. Is that, in your judgment, as it has been——

The Court: Well, show it to me if there is any question about it. It is understood your objection goes to all of this.

Mr. Charles: Perhaps you can find that.

The Witness: "C.I.F. (Cost, insurance and freight). This term constitutes a sale which includes cost of the lumber, cost of marine insurance on the lumber, and cost of all transportation charges to point of delivery in accordance with ocean bill of lading provisions."

Mr. Charles: My question was whether in such

(Testimony of George Kendrick.)

a sale you, Pope & Talbot, would pay the freight, or whether you would simply arrange for the payment of the freight.

A. Our interpretation of it is we just act as agents for the arranging of the freight and the insurance. When we would make a CIF sale, however, we are obligated to provide the total——

Q. If you ship by another line what form of contract would you use?

A. We use CIF, but the provision for the freight is acting as an agent for the buyer under the terms of bill of lading, as specified in this West Coast form. Is that what you mean?

Mr. Charles: That is all. Thank you, your Honor. [62]

(Briefs to be filed 20, 20 and 10 days, and it was agreed that oral arguments should be made if the Court should inform the attorneys of its desire to have them.)

[Endorsed]: Filed May 10, 1946. [63]

[Title of District Court and Causes.]

CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the following exhibits, Nos. 1, 2, and 3, were introduced at the trial of the above-entitled consolidated cases; that by stipulation and order the reporter's transcript of

testimony at said trial, Exhibit "A," attached to and made a part of answer of respondent in case No. 23992-R; exhibits numbered 1, 2, and 3, attached to and made part of Stipulation for Pre-trial Order in the same case; Exhibit "A," attached to and made part of answer of defendant in case No. 23058-S, and Exhibits 1, 2, 3, 4, and 5, attached to and made part of Stipulation for Pre-trial Order in the same case, are herewith forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, to be considered by it as part of the record on appeal by Pope & Talbot, Inc.

Witness My Hand and Seal at San Francisco,
this 10th day of May, 1946.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ E. H. NORMAN,
Deputy Clerk.

[Endorsed]: No. 11320. United States Circuit Court of Appeals for the Ninth Circuit. Pope & Talbot, Inc., a corporation, Appellant, vs. Guernsey-Westbrook Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 10, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11320

POPE & TALBOT, INC., a corporation,
Appellant,

vs.

GUERNSEY-WESTBROOK COMPANY,
a corporation,
Appellee.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY ON THE
APPEAL

Pope & Talbot, Inc., a corporation, in compliance with Subdivision 6, Rule 19 of the Rules of this Court, hereby adopts and incorporates herein as though set forth in full as the Statement of Points Upon Which It Intends to Rely on Appeal the "Statement of Points Upon Which Appellant Intends to Rely on Appeal" filed in the District Court on April 20, 1946, and set forth on pages 56 to 60, both inclusive, of the Record on Appeal.

/s/ IRA S. LILLICK,
/s/ LILLICK, GEARY, OLSON &
CHARLES,

Attorneys for Pope & Talbot, Inc.,
Appellant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 13, 1946. Paul P.
O'Brien, Clerk.

[Title of C. C. A. and Causes—Nos. 11320 - 11321.]

STIPULATION FOR CONSOLIDATION OF
CASES ON APPEAL

It Is Hereby Stipulated, subject to the approval of the above entitled Court, that the above entitled action number 11320 at law may be consolidated with the above entitled action numbered 11321 in admiralty, for the purpose of the printing of the Record on Appeal in the Circuit Court of Appeals for the Ninth Circuit and for the purpose of the filing of briefs on appeal in the Circuit Court of Appeals for the Ninth Circuit.

/s/ IRA S. LILLICK,

/s/ LILLICK, GEARY, OLSON, &
CHARLES,

Proctors and Attorneys for Pope &
Talbot, Inc., Appellant.

/s/ FARNHAM P. GRIFFITHS,

/s/ McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE,

Proctors for Blanchard Lumber Com-
pany of Seattle, and
Attorneys for Guernsey-Westbrook
Company, Appellees.

It is so ordered.

/s/ CLIFTON MATHEWS,

United States Circuit Judge.

[Endorsed]: Filed May 14, 1946. Paul P.
O'Brien, Clerk.

[Title of C. C. A. and Causes—Nos. 11320 - 11321.]

STIPULATION THAT ORIGINAL EXHIBITS
MAY BE CONSIDERED IN THEIR ORIGINAL
FORM WITHOUT THE NECESSITY
OF PRINTING

It Is Hereby Stipulated that Exhibits I to III, inclusive, offered upon the consolidated trial of the above causes on April 27, 1945, Exhibits I, II, III, IV, V attached to the Stipulation for Pre-Trial Order in case numbered 11320 above, and Exhibits I, II and III attached to Stipulation for Pre-Trial Order in case numbered 11321 above, shall not be printed in the Record on Appeal but that all said Exhibits or portions thereof may be considered in their original form and referred to on the appeal by the parties and by the court with the same force and effect as though the same were included in the printed record.

It Is Further Stipulated that Exhibit A attached to and made a part of the Answer of Pope & Talbot, Inc., a corporation, in case numbered 11320, and Exhibit A attached to and made a part of the Answer of Pope & Talbot, Inc., a corporation, in case numbered 11321, shall not be printed but that said exhibits may be considered in their original form as exhibits to the Answer on said appeal by the parties

and by the court with the same force and effect as though the same were included in the printed record.

/s/ IRA S. LILLICK,

/s/ LILLICK, GEARY, OLSON &
CHARLES,

Proctors and Attorneys for Pope &
Talbot, Inc., Appellant.

/s/ FARNHAM P. GRIFFITHS,

/s/ McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE,

Attorneys for Guernsey-Westbrook
Company, and

Proctors for Blanchard Lumber Com-
pany of Seattle, Appellees.

It is so ordered.

/s/ CLIFTON MATHEWS,

United States Circuit Judge.

[Endorsed]: Filed May 14, 1946. Paul P.
O'Brien, Clerk.

Nos. 11,320 and 11,321

United States
Circuit Court of Appeals

For the Ninth Circuit

POPE & TALBOT, INC., a corporation,

Appellant,

vs.

GUERNSEY-WESTBROOK COMPANY,

a corporation,

Appellee.

POPE & TALBOT, INC., a corporation,

Appellant,

vs.

BLANCHARD LUMBER COMPANY OF

SEATTLE, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF

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FILED

JUL - 6 1946

PAUL P. O'BRIEN,
CLERK

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United States
Circuit Court of Appeals
For the Ninth Circuit

POPE & TALBOT, INC., a corporation,
Appellant,

vs.

GUERNSEY-WESTBROOK COMPANY,
a corporation,
Appellee.

POPE & TALBOT, INC., a corporation,
Appellant,

vs.

BLANCHARD LUMBER COMPANY OF
SEATTLE, a corporation,
Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

This appeal relates to two suits, one in admiralty and one at law.

The libel in the admiralty action (Case No. 11321) (A2) was filed by Appellee Blanchard Lumber Company, and is based upon maritime contracts (bills of lading).

The complaint in the civil action (Case No. 11320) (T. 2) was filed by Appellee Guernsey-Westbrook Company, and is based upon a contract of sale and upon bills of lading. Said complaint alleges that Appellee is organized and existing under the laws of the State of Connecticut, that Appellant is organized and existing under the laws of the State of California, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.

The statutory provisions sustaining the jurisdiction of the District Court are:

Judicial Code, Sec. 24 (28 U.S.C.A. Sec. 41(3));

Judicial Code, Sec. 24 (28 U.S.C.A. Sec. 41(1)).

The jurisdiction in this court to review the final decree in admiralty and the judgment at law rests upon *Judicial Code*, Sec. 128 (28 U.S.C.A. 255).

STATEMENT OF THE CASE

In December, 1941, the Lumber Division of Appellant sold to Appellee Guernsey-Westbrook Company approximately 664,991 board feet of Douglas Fir lumber (T. 21), and sold approximately 270,170 board feet of the same type of lumber to Appellee Blanchard Lumber Company (A. 25).

The contract of sale to Guernsey-Westbrook Company consisted of orders by the purchaser (Exhibit 4 to pre-trial stipulation in case No. 11320—See Stipulation as to Original Exhibits on Appeal, T. 139) and acceptances

by the seller (Exhibit 5 to pre-trial stipulation) subsequently memorialized by invoices (Exhibit 2 to pre-trial stipulation). The sale was C.I.F. Brooklyn. The method of payment of the agreed purchase price was stated in the documents as:

“Terms: Ocean Freight Net Cash on arrival of steamer; balance 98% Sight Draft with Documents attached including negotiable bill of lading to order of Marine Midland Trust Co. of New York.”

Appellant's Lumber Division, acting as agent for the buyer (T. 134, 135) arranged transportation on the SS ABSAROKA with the McCormick Steamship Company Division of Appellant from St. Helens, Oregon, to Brooklyn, New York, on collect freight bills of lading which named the Lumber Division as shipper, Marine Midland Trust Co. of New York as consignee, with directions to notify Guernsey-Westbrook Company (Exhibit 1 to pre-trial stipulation, Case No. 11320).

The contract of sale between Appellant's Lumber Division and Appellee Blanchard Lumber Company was F.A.S. St. Helens, Oregon (Exhibit 2 to pre-trial stipulation in Case No. 11321; A. 66). Transportation on the SS Absaroka to Philadelphia, Pa., was arranged with the McCormick Steamship Company Division on collect freight bills of lading naming Blanchard Lumber Co. shipper and consignee (Exhibit 1 to pre-trial stipulation in case No. 11321).

The bills of lading for all shipments contained an earned-freight clause whereby the freight was deemed earned at any stage, whether goods or vessel lost or not lost (T. 11, 39; A. 14).

Appellees' lumber was loaded to the steamship Absaroka on or about December 13, 1941 (T.24-A.26). The SS Absaroka sailed from St. Helens, Oregon, December 18, 1941, bound for east coast ports via the Panama Canal (T.24-A.26). The first knowledge of the presence of Japanese submarines on the Pacific Coast was conveyed to the vessel by wireless on December 20 (T.26-A.28). On December 24, 1941, when approximately 5 miles off Point Fermin, Calif., she was struck on her starboard quarter between the No. 4 and 5 holds by a torpedo from a Japanese submarine. The explosion blew off a portion of the after deck load and tore a hole approximately 15 by 20 feet in the shell of the ship (T.24-A.27; Exhibits 1(a) to 1(g)).

The Absaroka was towed into Los Angeles harbor and beached (T. 91). The lumber cargo, a part of which had been oil-soaked and a part soaked by sea water (T. 97), was discharged by January 7, 1942, and the vessel placed on dry dock for examination January 19, 1942 (T. 25-A.27). A repair contract was made with Bethlehem Steel Company January 22, 1942, with the express understanding that all ship repair would be based on priorities and that the shipyard might at any time suspend work on the SS Absaroka for work considered more urgent in the war effort (T. 94). The repairs were not completed until May 9, 1942, more than 5 months after the torpedoing (T. 25, 94-A.25). The total cost of repairs was \$326,921.30, exclusive of salvage charges (T. 26-A.29).

On February 5, 1942, after taking into account the impossibility of predicting the approximate time repairs might be completed (T. 95, 102), the existing and pros-

pective increase in submarine activity on the Pacific Coast, the Gulf and Caribbean area and Atlantic Coast (T. 100, 101), the probability that if repairs were completed the government would either requisition the vessel or direct its movement other than intercoastal for the duration of the war (T. 100), the deterioration of lumber and increased storage costs resulting from the oil and salt water absorbed by the cargo (T. 96, 99) and other factors to be subsequently discussed, Appellant's McCormick Steamship Company Division notified Appellee of its intention to abandon the voyage, reserving its right against freight under the bill of lading (T. 26-A. 29). Appellees protested the abandonment (T. 26-A. 29). Pursuant to agreement, the lumber was sold by Appellant, who retained the freight from the proceeds.

An action at law based on the contract of sale and the bill of lading was brought in the District Court by Appellee Guernsey-Westbrook Company for return of \$10,543.85, being the full amount of freight. An admiralty action based on the bills of lading was brought by Appellee Blanchard Lumber Company for return of \$4,322.72. The cases were submitted on pre-trial orders (T. 21 to 32-A. 25 to 33), and upon the testimony of three witnesses on behalf of Appellant (T. 73 to 136). In the law action, judgment was granted in the amount prayed for. The decree in the admiralty action was in the amount asked, except that \$26.59, the value of the libellant's lumber which was destroyed, was deducted. The cases were consolidated by stipulation and order for purposes of printing the record on appeal and briefing (T. 138-A. 65). The memorandum opinion and order

for judgment (T. 31 to 48) and the testimony at the consolidated trial (T. 73 to 136) are printed in the Transcript of Record in case No. 11320, but are not printed in the Apostles on Appeal in case No. 11321.

THE QUESTIONS INVOLVED IN THE APPEAL

There are two issues to be determined on this appeal. The first concerns only the action at law, case No. 11320. The Appellee in that case contends that the orders, acceptances, and bills of lading constitute in effect one contract of affreightment; that the provision "Ocean freight net cash on arrival of steamer" makes delivery of the lumber a condition to payment of freight, and, being in conflict with the earned-freight clause of the bill of lading, controls. Appellant contends that the orders and acceptances constitute a C.I.F. contract of sale between Appellee and Appellant's Lumber Division, by which the buyer became unconditionally obligated to pay the freight. The provision "Ocean freight net cash on arrival of steamer" describes a method of discharging the obligation. The contract of sale was thus not in conflict with the earned freight clause of the contract of affreightment.

As the sale to Appellee, Blanchard Lumber Company, was F.A.S. St. Helens, Oregon, case No. 11321 does not involve the question arising under the terms of the sale.

The second* question which is involved in both cases and is the sole issue in the Admiralty action (Case No.

*The District Court had before it an additional contention of Appellee that the earned-freight clause was optional and Appellant had not exercised the option to make it effective. The District Court determined that the earned-freight clause was not optional but self-executing. This question is not involved in this appeal.

11321) is whether the circumstances were such as to justify Appellant in abandoning the voyage at Los Angeles and retaining the freight under the earned-freight clause.

Both issues were determined in favor of Appellees by the District Court. If the first issue is decided favorable to Appellant on this appeal, Appellant will be entitled under the bill of lading to retain \$937.25 in the action at law regardless of the decision on the second issue. This sum represents freight on lumber cargo blown overboard and lost at the time of torpedoing. It is accordingly not involved in the issue of abandonment and would be comparable to the \$26.59 granted appellant by the District Court for freight on lumber blown overboard owned by the Appellee Blanchard Lumber Company.

ARGUMENT

The argument in this brief will be divided into two parts. As the first issue, relating to interpretation of the contract of sale, involves only the action at law, No. 11320, in connection with that issue the rules with respect to actions at law will be followed. The second issue on the question of abandonment is pertinent to both the law action and the admiralty action. The argument is identical for each action. An attempt will be made to combine the rules as to law and admiralty in presenting this argument.

PART I

The Contract of Sale unconditionally obligated the buyer to pay the freight and is not in conflict with the earned-freight clause of the bill of lading.

A. Specification of Error:

The District Court erred in finding that the orders and acceptances, together with the bills of lading, constituted a contract of affreightment under which delivery of the lumber at its destination was a necessary condition to be fulfilled before Appellee became obligated to pay the freight (T. 54, 55-Spec. of Errors, I, II, III, IV, V and VI, T. 59, 60).

B. Argument:

There are two contracts involved: (1) a contract of sale between appellant's lumber division as seller and appellee Guernsey-Westbrook Company as buyer, the buyer obligating itself to pay the freight as part of the purchase price irrespective of delivery at destination; and (2) a contract of affreightment between the lumber

division as agent for the buyer and the McCormick Steamship Company Division of Appellant.

The orders of Guernsey-Westbrook Company, the acceptances of the orders by appellant's lumber division, and the invoices all recite that the sale is *C.I.F. Brooklyn, N. Y.* (For original sample of these documents, see Exhibits 4, 5, 6 to Pre-trial Stipulation.) The sale price, as in all C.I.F. sales, included cost, insurance, and freight.

In a C.I.F. sale, the freight may be handled in either of two ways: (1) the seller may pay the insurance, pre-pay the freight and on forwarding the documents, immediately collect from the buyer the full C.I.F. purchase price; or (2) the seller may deduct the cost of the freight from the purchase price in billing the buyer, arrange for insurance and transportation on behalf of the buyer, and thereby relieve himself of any further obligation under the contract, the buyer directly assuming the obligation to pay the freight.

This choice of methods is pointed out by the court in

Warner Bros. Co. v. Israel, 101 F. (2d) 59 at 60, (C.C.A. 2) as follows,

“Under a c.i.f. contract the seller receives a purchase price payable as the parties agree and for that consideration is bound to arrange for the carriage of the goods to their agreed destination, for insurance upon them for the benefit of the buyer, *and either to pay the cost of the carriage and insurance or allow it on the purchase price.* When this has been done the seller *has fully performed* and is entitled to be paid upon delivery of the documents *regardless of whether the goods themselves have arrived at their destination or ever will.*”*

*Emphasis throughout the brief is ours.

See also,

Thames & Mersey M. Ins. Co. v. United States, 237

U.S. 19, 26, 59 L.Ed. 821, 824;

Gamboa, Rodriguez, Rivera & Co. Inc. v. Imperial

Sugar Co., 125 F. (2d) 970 (C.C.A. 5);

Madeirense Do Brazil S/A v. Stulman-Emrick

Lumber Co. 147 F. (2d) 399 (C.C.A. 2).

These cases support the position that the choice of methods does not change the rule that the buyer, under a C.I.F. contract, not only has the risk of loss of goods in transit (for which insurance is taken out in his name), but also, as between buyer and seller, has the obligation to pay the freight charges irrespective of delivery.

The contract of sale between appellant's lumber division and Guernsey-Westbrook Company adopted the second alternative method of payment under a C.I.F. sales contract. It was a common practice in the lumber trade to enter into C.I.F. sales contracts in which the price included the cost of insurance and freight, but in order that the buyer might have the use of its money during transportation, the freight, which is a substantial part of the cost of lumber to an eastern buyer, would be allowed on, or deducted from, the purchase price, and the seller on behalf of the buyer would arrange transportation with a carrier on collect-freight basis (T. 110, 111, 112, 123). This practice was permitted by appellant's lumber division and arrangements for transportation on behalf of a buyer were made by the lumber division, not only with appellant's McCormick Steamship Company Division, but also with other steamship companies. (T. 14.)

The decision of the District Court that delivery was a necessary condition to the payment by the buyer of the freight charges, which is contrary to the rule in C.I.F. sales, is based upon the provision of the acceptance which reads: "Terms: *ocean freight net cash on arrival of steamer*"; The District Court (T. 35 to 39) considered that provision ambiguous in not showing clearly whether the phrase constituted a condition to, or a manner of, payment of freight, but determined the ambiguity in favor of a condition. The court considered the orders, acceptances, and the bill of lading as part of one contract of affreightment, and, using as authority

Toyo Kisen Kaisha v. W. R. Grace & Co., 48 F. (2d) 850, affirmed 53 F. (2d) 740 (C.C.A. 9), cert. den. 273 U.S. 717, 71 L. Ed. 856.

determined that the above-quoted provision was in conflict with the earned freight clause of the bill of lading and prevailed.

Even accepting the District Court's theory that the orders, acceptances and bills of lading constituted but one contract, the decision is still erroneous. The court was confronted with two provisions in what it termed a single contract. One, the clause in the acceptance, it considers ambiguous. (T. 38.) The other, the earned-freight clause which is favorable to appellant, it determines is clear. (T. 41.) These two provisions, it says, are in conflict, and both may not stand. But the District Court did not resolve the conflict in favor of the clear provision, which supports appellant. *It resolved the conflict in favor of its construction of the ambiguous clause.* Proper con-

struction would require, either that the ambiguity be solved by the clear provision, or that the same result be reached by resolving the conflict between the two provisions against the one which is ambiguous.

The court fell into further error in failing to distinguish between a sales contract and the established rules relative thereto and an affreightment contract. The terms on which the court based its decision that delivery was a condition to payment of freight is the language of the contract by which the parties stated the choice of method of payment under the C.I.F. contract. The words "Terms: ocean freight net cash on arrival of steamer" stated *how*, or the *method* by which, freight which was part of the purchase price was to be paid. The emphasis was not on delivery, but on the terms, the price, the manner of payment. It is established in the law of sales that where the place of delivery is used in connection with price and terms of payment it does not make the delivery a condition to the performance of any obligation in the contract, but merely illustrates either the amount of price or the manner of its payment.

In *Warner Bros. Co. v. Israel*, 101 F. (2d) 59 (C.C.A. 2), sugar was sold on C.I.F. terms, the freight being handled in the same manner as in the contract of sale under consideration. After arranging for transportation and insurance the seller forwarded documents with draft attached for 95% of the purchase price less the freight. While the sugar was in transit between the Philippine Islands and New York, the sugar quota was filled, and the buyer accordingly could not take delivery. The seller sued for the balance of the purchase price.

The buyer defended on the ground that delivery was made a condition to any further obligation on its part, citing phrases in the contract comparable to the language under consideration in this appeal; such as a provision for determination of final payment of price on "net delivered weight" and "settlement of each shipment was to be made on final test" and "delivery to be tendered ex vessel at a customary safe wharf or refinery at New York, Philadelphia or Baltimore to be designated by buyers." The Second Circuit Court of Appeals rejected the buyer's contention that such language made delivery a condition to any further obligation by the buyer under the contract, and considered the language as dealing with "an adjustment of the purchase price." After pointing out, in the language previously quoted, the alternative methods under a C.I.F. contract, the Second Circuit Court of Appeals stated:

"For the moment we will accept the buyer's contention that there was no delivery of the sugar to him at the point of destination and confine the inquiry to whether or not delivery was necessary, not *as a matter of performance by the carrier of its contract, but as a matter of performance by the seller of the contract of sale upon which it has sued.* In order to become entitled to payment of the purchase price under the ordinary C.I.F. contract, of course, such *delivery of the goods would not be a condition precedent to be performed at the risk of the seller. Nor is it made so merely because the obligation to contract for the carriage is expressed in the form of delivery of the goods at a designated place.*

* * *

"Consequently, it must be held that the seller made full performance by shipping the sugar and deliver-

ing the documents as required by the terms of the contract of sale”;

In *Gamboa, Rodriguez, Rivera & Co. Inc. v. Imperial Sugar Co.*, 125 F. (2d) 970 (C.C.A. 5), sugar was sold under a C.I.F. contract of sale. The exact terms of the sales contract are not set out in the opinion but it states:

“Insurance was procured and invoices were prepared by Gamboa [seller] on each of the shipments and from the invoice price there was deducted the cost of freight which was to be paid at destination.”

It may reasonably be presumed, therefore, that the contract provided freight “to be paid at destination,” a comparable phrase to “ocean freight net cash on arrival of steamer.” The shipments were made on three vessels from the Philippine Islands to Galveston, Texas, but because of the outbreak of the war the vessels, being of German ownership, abandoned the voyage and delivered the sugar at intermediate ports, demanding payment in full for the freight, which was ultimately paid by the buyer. On being sued by both parties, the carrier paid the money into court. (Its bill of lading provisions do not appear.) The seller contended that it was entitled to the refunded freight on the ground that the buyer, in paying it, was acting as agent for the seller. The Fifth Circuit Court of Appeals held, however, that the seller, having delivered the goods to the carrier, was relieved of any further obligations under the contract, including freight obligations, and that, when it shipped the sugar, and forwarded the proper documents to the buyer, its obligations and rights under the contract were

at an end, the buyer from that point on having the risk of the goods and the freight and being accordingly entitled to the refund. The pertinent part of the court's opinion is as follows:

“Appellant's position will not be sustained. Gamboa has, in fact, realized every cent it expected to receive or to which it was entitled under the contract. It has been paid for the sugar and the insurance, *and has been relieved of its freight obligations. When it shipped the sugar, and forwarded the proper documents to Imperial, its obligations under the contract were at an end. From that moment the buyer alone stood to lose on the ventures.*”

The following decisions, while not involving contracts on C.I.F. terms, serve to illustrate that in the law of sales, where delivery is mentioned in conjunction with the terms of price, it refers to the amount of or method of payment of price and is not a condition to the obligation *to pay* the price or to the passing of title or to other performance.

In *Boston Iron & Metal Co. v. Rosenthal*, 68 Cal. App. (2d) 564, 156 P. (2d) 963, the court had under consideration a C. & F. contract which provided:

“Price: \$30 per gross ton *delivered Japan*. Shipment: during month of May, June, July, August, 1937. Terms: all payments to be cash. * * * Accepted: C. & F. Japan accepted ports.”

It was contended that under these terms, contrary to the general rule of C. & F. contracts, buyer was not obligated to pay the price until actual delivery. The question, as stated in the opinion, was “whether plaintiff was obligated to pay for merchandise ‘delivered

Japan' only." The court held the words "delivered Japan" did not create a condition requiring seller to actually deliver the goods in Japan but that the seller completed the obligation on delivery to the carrier.

The court said, in reference to the phrase "deliver Japan":

"The trial court was undoubtedly satisfied, as we are, that the words in that collocation were used to refer to and qualify price, and not to indicate the point of delivery or where title was to pass."

In *Myer v. Sullivan*, 40 Cal. App. 723, 181 P. 847, the contract stated:

"1.43 1/3 per 100 lbs. f.o.b. Kosmos Steamer at Seattle."

No "Kosmos Steamer" was available at Seattle and the seller cancelled the order on the ground that he could not make delivery in accordance with the contract. The court held that the above-quoted phrase did not indicate the condition or place of delivery, but referred to the manner in which the price was determined. The court said, on page 730:

"The general rule seems to be that if the agreement is to sell goods f.o.b. at a designated place, such place will ordinarily be regarded as the place of delivery; but the effect of the f.o.b. depends on the connection in which it is used and if used in connection with the words fixing the price only, it will not be construed as fixing the place of delivery."

In *Goodyear Tire & Rubber Co. v. Northern Insurance Co.*, 92 F. (2d) 70 (C.C.A. 2), the sales contract provided:

“Terms: Net cash 30 days from date of delivery at New York City f.o.b. cars New York City.”

Before they could be placed on cars, the goods were destroyed. It was contended that “f.o.b. cars New York City” was not only a condition of delivery, but that title did not pass until the goods were actually placed on the cars. The court said:

“In the case at bar New York City was specified as the ‘Place of Delivery’, and the f.o.b. provision was not put under that caption, where one would naturally expect to find it if it were intended to indicate the point at which delivery was to be complete. Instead, the f.o.b. provision was placed under the heading ‘Terms,’ where it would seem to have relation to price and to indicate that the cost of loading on cars was to be borne by the seller.”

A similar line of reasoning was used by the court in *Pond Creek Mill and Elevator Co. v. Clark*, 270 F. 482 (C.C.A. 7) in holding that the term “Basis Chicago” following a designated price referred to the terms or conditions of sale with respect to price and was not a requirement of delivery.

It is thus apparent that in using the expression “Terms: ocean freight net cash on arrival of steamer: Balance 98% sight draft,” etc., appellant’s lumber division, as seller, being familiar with the usual rules relating to sales contracts, was describing the manner in which the purchase price under the C.I.F. contract would be arranged. The seller, after obtaining insurance and arranging for the transportation, forwarded the bill of lading, together with the draft for 98% of the purchase price

less freight, and completed its obligation under the contract. As between buyer and seller, the buyer continued to be obligated for the freight which he could take care of by paying cash on arrival of the steamer under the collect bill of lading, but which he was obligated to do in any event.

The District Court, based its findings on the authority of its decision in *Toyo Kisen Kaisha v. W. R. Grace & Co.*, supra, and the affirming decision of this Honorable Court in the same case, relying on that case in two respects: first, to find that the contract between Appellant's lumber division and the buyer made delivery a condition to payment of freight by comparing the phrase used in the T.K.K. contract "freight payable in San Francisco on receipt of weights from Honolulu" to the phrase, "ocean freight net cash on arrival of steamer"; secondly, to find that there was but one contract—a contract of affreightment consisting of the typewritten orders and acceptances and the printed bill of lading—and that the language quoted above was in conflict with the earned freight clause and controlled.

W. R. Grace & Co., the seller, arranged with the T.K.K. Line to transport 2500 long tons of nitrate from Chile to Honolulu. The "special freighting agreement" was originally made by telephone and confirmed by letter of January 14, 1921. *The opinion does not indicate what the arrangements were as between seller and buyer—the only arrangements involved are those as between seller and carrier.* The contract provided in part as follows:

"2,500 long tons Nitrate of Soda March shipment per 'Tokuyo Maru' from Nitrate Port to Honolulu at \$7.00 per ton of 2,240 pounds gross weight delivered.

“Freight payable in San Francisco on receipt of weights from Honolulu.”

The same day W. R. Grace & Co. sent a letter to its Chilean agents stating that it had made arrangements for the shipment and the freight rate and that freight was “payable at San Francisco on receipt of weights from Honolulu.” The letter gave the following further instruction:

“In making up bills of lading we would ask you to kindly omit freight therefrom and just let the same carry the clause ‘freight as agreed.’ ”

The cargo was loaded at Chilean ports. The bills of lading carried various marginal notations as freight “to be paid as per margin in destination,” “freight as per agreement” or “freight as agreed.” The bills of lading contained the usual “freight earned, vessel lost or not lost” clause. The vessel and the cargo were destroyed by fire en route. The carrier sued W. R. Grace & Co., the seller, for the freight. The District Court held that the written agreement constituted the contract of affreightment requiring delivery and receipt of weights at Honolulu before payment of freight and that the bills of lading were merely receipts. The libel was dismissed. This court affirmed the judgment, holding that, while the bill of lading was more than a mere receipt, the entire contract of affreightment, in so far as “freight,” was concerned was contained in the letter from seller to carrier confirming oral conversations, and by that letter the *carrier* agreed to be paid its freight on delivered weights. The marginal notations in the bill of lading

were considered to demonstrate that all agreement as to freight was per prior contract with the carrier. The earned freight clause was accordingly held to be omitted by agreement.

This Court said, on page 742:

“That earlier agreement of January 14, 1921, is perfectly self-consistent and does no violence to the bills of lading provided we exclude from those bills, *as is implied by their marginal directions, questions of freight.*”

and on page 743:

“The letter of January 14, 1921, constitutes the complete contract of affreightment so far as freight rates and their payment are concerned.”

and further on page 744:

“Without further reciting the evidence we believe that a study of the record leads to the inevitable conclusion as to all matters relating to freight, the oral agreement and the confirmatory letter constituted the contract between the parties in the instant case. The marginal notations on the bills of lading themselves would so indicate.”

It is submitted that this decision does not support the District Court's erroneous findings. The case is clearly distinguishable in two major respects:

1. The contract referred to is a contract between seller and carrier. It is a contract of affreightment not a contract of sale. No contract between seller and buyer appears or is referred to in any way. It is assumed without question that seller pays the freight if the freight is payable. In the case under consideration in this appeal, on the other hand, the contract, which is considered

by the District Court as analogous to the contract in the T.K.K. case, is a contract between Appellant's lumber division, as seller, and Appellee, as buyer. It is a contract of *sale*. It could not as to carrier constitute a contract of affreightment with respect to freight or otherwise. The contract in which the carrier is involved is solely the bill of lading. When a contract of *affreightment* uses the terms "freight payable in San Francisco on receipt of weights from Honolulu" it is making delivery a condition to paying freight. Such a contract does not deal with "price" as in a sales contract, and, hence, the reference cannot, as in a sales contract, refer to the manner of paying the price.

2. The decision in the T.K.K. case, as appears from the above quotations, stresses the marginal notations in the bills of lading that freight is "per agreement" or "as agreed." No such marginal notation appears on the bills of lading in our case. The lack of such marginal notation is further evidence that Pope & Talbot, Lumber Division, was acting as seller and did not consider its contract with the buyer as being a part of the bill-of-lading contract subsequently made on behalf of the buyer with the McCormick Steamship Company Division, as carrier.

Terms in an affreightment contract cannot be used to construe terms in a sales contract. The bill of lading and the sales contract are not in conflict. As Pope & Talbot, acting as seller, performed its obligations under the sales contract, the buyer, thereafter assumed all risks and obligations including the obligation to pay the freight, and, under the earned-freight clause, the carrier is entitled to retain the freight.

ARGUMENT—PART II

There was a commercial frustration which justified the abandonment of the voyage and collection of the freight.

A. Specification of Error:

The District Court erred in failing to consider, in determining the question of frustration, all of the factors confronting appellant at the time of its decision to abandon and in failing to find that there were sufficient facts to constitute commercial frustration and justify appellant's abandoning the voyage and retaining the freight money under the earned freight clause of the bill of lading.

Points VII through XIV, "Statement of Points Upon Which Appellant Intends to Rely on Appeal," T. 60 through 64. (Case 11320.)

Assignment of Errors II, III, IV, XII, XIII, XIV, XVI, (A. 48, 50, 51, 52, 53, 54) (Case 11321). Reprinted in Appendix hereto.

B. Argument:

It is appellant's position that the facts surrounding its decision to abandon the voyage justified the abandonment both under the bill-of-lading provisions and under the general doctrine of commercial frustration the voyage being justifiably abandoned, appellant was entitled to its freight under the earned-freight clause of the bill of lading. The error committed by the District Court was in holding that there was not a commercial frustration of the venture warranting appellant's taking advantage of its earned-freight clause. The validity of the earned-freight clause was upheld.

The essence of the earned-freight clause under consideration is:

“3. Full freight to destination * * * due and payable * * on receipt of the goods * * and the same * * shall be deemed fully earned and due and payable to the carrier at any stage, before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost, * * *.” (T. 11, 39.)

Such clauses have long been upheld by the Supreme Court and by the Ninth Circuit Court of Appeals:

Allenwilde Transport Corp. v. A. W. Pidwell,
248 U.S. 377, 63 L. Ed. 312;

International Paper Co. v. The Gracie D. Chambers,
248 U. S. 387, 63 L. Ed. 318;

Standard Varnish Works v. The Bris,
248 U.S. 392, 63 L. Ed. 321;

Portland Flouring Mills Co. v. British & F.M. Ins. Co., (C.C.A. 9) 130 Fed. 861.

The widespread use of such a clause in commercial practice was recognized by this Court in

Mitsubishi Shoji Kaisha v. Societe Purfino Maritime (The Laurent Meeus) 133 F. (2d) 552 (C.C.A. 9, 1942)

in stating, on page 558:

“For over a quarter of a century the majority, if not all, of the larger Steamship Companies have had similar clauses in the hundreds of thousands of bills of lading issued for the ocean carriage of merchan-

dise. They are accepted as normal incidents of sea borne commerce and are one of the factors in determining ocean freights.”

Although the bill of lading states that freight shall be deemed earned at any time, there must be some further justification for the carrier to be entitled to freight without delivery of the goods at destination. Paragraph 7 of the bills of lading (Exhibit I attached to pre-trial stipulation in each case) reads, in part, as follows:

“If because of conditions, actual or reported, at or near or between the port of loading and/or the port of discharge, such as *war, hostilities * * * blockade * * * or any regulations of any government * * * or any condition whether of like nature to those named or otherwise and whether existing or anticipated*, which may cause the Master to decide that it is *unsafe or impracticable to proceed* from or to any port * * * or *that the loading or discharging or carriage of the cargo is likely to be delayed * * ** then the vessel may, at its option * * * store the goods ashore * * * at the port of place where the vessel then is * * * all at the risk and expense of the goods, their shipper, owner and consignee. Any such disposition of the goods shall constitute a final delivery thereof, but the Carrier shall retain a lien on the goods for all proper charges * * *.”

Appellant concedes that, although this language is sufficiently broad to permit abandonment of the voyage under many circumstances, the action taken under the clause must not be unreasonable, arbitrary or capricious. *The Wildwood*, 133 F. (2d) 765, (CCA 9) at 767.

Such provisions of the bills of lading are implemented by an implied right to abandon under the doctrine of commercial frustration in the general maritime law.

The Kronprinzessin Cecilie, 244 U.S. 12, 61 L. Ed. 960;

Texas Co. v. Hogarth Shipping Co. (CCA 2) 265 Fed. 375, Aff'd 256 U.S. 619, 65 L. Ed. 1123;

The Wildwood, 133 Fed. (2d) 765 (CCA 9).

The frustration depends upon the facts of each case and is to be determined as of the time of abandonment. *The Styria v. Morgan*, 186 U.S. 1, 46 L. Ed. 1027. The intervening event must have been beyond the contemplation of the parties in making the contract.

Admiral Shipping Co., Ltd., v. Weidner, Hopkins & Co., 1 KB 242, 13 Asp. M. C. 246, 249.

Commercial frustration may be the result of a number of events which fall into fairly definite categories. Probably the most frequent grounds of commercial frustration is wartime governmental interference with the venture such as refusal to grant clearance from port, or embargo, or requisition or threat of such measures.

Allenwilde Transportation Corporation v. A. W. Pidwell, 248 U.S. 377, 63 L. Ed. 312;

International Paper Co. v. The Gracie D. Chambers, 248 U.S. 387, 63 L. Ed. 318;

Standard Varnish Works v. The Bris, supra 248 U.S. 392; 63 L. Ed. 321;

The Malcolm Baxter, Jr., 277 U.S. 323, 72 L. Ed. 901;

Robinson on Admiralty, P. 653.

That such interference is not permanent does not militate against a finding of frustration if the duration is unpredictable.

“The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition,—that is, the submarine menace,—and that as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it.” (*Allenwilde Transportation Corporation v. Pidwell, supra*).

Nor is *actual* governmental interference a prerequisite. Reasonable anticipation of such interference will constitute commercial frustration. The rule was stated by Hough, J., in *The Claveresk* (CCA 2), 264 Fed. 276, 282, as follows:

“In referring to decisions of authoritative reasoning on this whole subject, it must be remembered that a charter party, a bill of lading, a freight contract, and most written agreements affecting ships as vehicles of commerce, are ‘mercantile contracts’ * * * Bearing this in mind, *The Styria* * * * and *The Kronprinzessin Cecilie* * * * are modern instances of how apprehension of restraint, something much less than actual governmental compulsion, may suffice to dissolve the obligation of a contract.”

Danger or threat of danger beyond that existing or considered at the time of making the contract is another frequent ground of commercial frustration.

The Styria v. Morgan, 186 U.S. 1, 46 L. Ed. 1027;

The Kronprinzessin Cecilie, 244 U.S. 12, 61 L. Ed. 960;

The Wildwood, 133 F. (2d) 765 (CCA 9);

M. A. Quinn Export Co. v. Seebold, 287 Fed. 626 (CCA 5).

While essentially all grounds of frustration, except where the vessel or cargo are actually lost, are in effect based on an indefinite period of delay before the venture may proceed, delay of itself is considered a ground for declaring a venture frustrated. The principle of commercial frustration by delay was enunciated in *Admiral Shipping Co., Ltd., v. Weidner, Hopkins & Co.*, 1 K.B. 242, 13 Asp. M.C. 246 in the following oft-quoted language:

“The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by it the fulfillment of the contract in the only way in which fulfillment is contemplated and practicable is so *inordinately* postponed that its fulfillment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made.”

Turning to the facts in the case presented by this appeal, it is difficult to conceive of a set of circumstances which combine in one case as many grounds for commercial frustration of a venture as in the case at bar. In addition to such factors as danger of fire in, and deterioration of, the oil- and sea-water-soaked lumber, and costs of storage, there was direct enemy action, increased hazard and threats of increased dangers from submarine action, reasonable apprehension of government seizure or interference for an indefinite period, unreasonable, unpredictable, inordinate delay in repairing, each of which factors is in itself sufficient to constitute commercial frustration. The combination compels such a finding.

The decision to abandon was made February 5, 1942. As pointed out by this court in *The Wildwood*, supra, in considering the question of increased war hazard as a reason for abandonment, the question is increase "over that existing at the time the agreement to carry was made." The bills of lading were executed December 13, 1941, less than a week after the attack on Pearl Harbor. (T. 23 - A.26.) While appellant, prior to sailing on December 18, 1941, under governmental direction took some precautions such as painting the vessel (T. 89), it and others in private shipping business at that time actually no more anticipated submarine torpedo attacks on the Pacific Coast from an enemy whose home base was 7,000 miles away than did the public conceive of the attack on Pearl Harbor. The voyage contracted for was intercoastal via the Panama Canal, not transoceanic. On December 13, when the affreightment contracts were made, and on December 18, when the vessel sailed, there had

been no hint of enemy submarines in Pacific Coast waters. (T. 100, 25 - A. 22.) There is no indication in the record of any torpedoing of American vessels by that time on the Atlantic coast or in the Gulf and Caribbean. The first indication of the presence of Japanese submarines in Pacific Coast waters was conveyed by wireless to the Absaroka while underway on December 20, 1941. (T. 100, 25 - A. 22.) That information constituted sufficient increase of hazard to have justified the Absaroka in scurrying for the nearest port and declaring the voyage frustrated rather than continuing as she did and suffering a torpedo attack. The hazard, rather than diminishing, continued to increase. By February 5, when the notice of abandonment was sent, there had been a considerable number of sinkings on the Pacific and Atlantic coasts, and the German submarine menace in the Gulf and Caribbean area had reached alarming proportions, particularly brought home to appellant by the loss of its vessel West Ivis (T. 101, 102). No intercoastal voyages were being undertaken (T. 100), and there was no indication of any prospective intercoastal convoying (T. 102). That ultimately the submarine menace was considerably reduced is irrelevant. No one—least of all a private citizen—could, on February 5, 1942, predict any great improvement, nor foretell with any degree of certainty how long the menace would continue. We submit that the risk and hazard of an intercoastal voyage from and after December 20, 1941, and especially as viewed from early in February, 1942, were far greater than that assumed when the bills of lading were issued December 13, 1941, and that appellant could not be re-

quired to undergo such increased risk in the performance of its contract. That this increased hazard is alone sufficient to constitute a frustration of the voyage is demonstrated by the decided cases.

Except for the fact that the increased hazard was possibility of seizure rather than torpedoing (a fact in favor of appellant's position), *The Wildwood*, 133 Fed. (2d) 765, decided by this Honorable Court in 1943, bears a close analogy to the *Absaroka*. Bills of lading were issued February 20, 1940, for cargo to be carried from Jersey City to Vladivostok, subsequently changed to include Petropavlovsk while the vessel was en route. The shipper and the cargo were Russian; the vessel, American. Both knew when the bills of lading were issued that the British were exercising "Contraband Control" in the Atlantic, having seized over 100 American-owned vessels. Both knew that a Russian vessel, the *SELENGO*, had been sized by the British the month before off Formosa and taken to Hong Kong, which act this Court described as "partial blockade" in the Pacific waters. "Both the carrier and shipper knew," as the opinion states on p. 767, "when clause 4 (comparable to clause 7 quoted above) was agreed upon, that the New Jersey-Petropavlovsk-Vladivostok voyage was not as free of likelihood of seizure by a belligerent as in peace time." After the *Wildwood* had sailed from Honolulu, its owners learned for the first time that the British, in asserting "contraband control," had seized a Russian vessel bound on a voyage to the same ports as the *Wildwood*. The owners instructed the master to bring the ship to Seattle. The cargo was discharged and the voyage terminated. There were no subsequent seizures.

This Court held that, both under the bill of lading and "the general maritime law," the carrier was entitled to abandon the voyage. The apprehension of danger arising from the seizure of the one vessel after the voyage commenced was considered "a far greater war hazard than that contemplated by the parties when the charter was made" and the bills of lading issued.

In *M. A. Quinn Export Co. v. Seebold*, 287 Fed 626 (C.C.A. 5), when the charter was made, the shipowner, a neutral, knew that the cargo to be carried to a belligerent port was contraband and that it might be seized or the vessel destroyed. After the contract was made, Germany announced and commenced to execute a policy of unrestricted submarine warfare. The court considered this sufficient increased hazard to constitute frustration, saying, on page 628:

"The incidents mentioned were referred to in support of the contention that before the declaration of unrestricted submarine warfare a neutral vessel undertaking such a voyage as the one stipulated for incurred a risk of being sunk by a German submarine or of being condemned by German authorities. Though such risks existed and were in contemplation of the parties when the charter party was entered into it cannot plausibly be denied that the situation of neutral vessels engaged in such voyages as the one provided for by that instrument *was materially changed for the worse* by the operations of German submarines as carried on after the issuance of the proclamation of January 31, 1917." (Emphasis ours.)

In *Kronprinzessin Cecilie*, 244 U.S. 12, 61 L. Ed. 960, bills of lading were issued July 27, 1941, and the German

vessel sailed for England the following day but turned back July 31 on being advised that war was declared by Austria against Servia. The master was apprehensive of war between England and Germany and consequent capture of the vessel in a British port. As it turned out, the probabilities are that the ship would have been able to discharge its cargo at destination and be out of English waters by the time war actually broke out.

The Supreme Court upheld the master's action in abandoning the voyage because of the apprehension that war would be declared. While the court indicated that neither party to the contract thought, on July 27th, that it would not be performed, it is plain that the parties were aware of the existing tense international situation. The change in hazard at the time of the abandonment a few days later was that a state of war existed between two countries not concerned in the adventure.

The increase of hazard over that contemplated by the contract is far less in each of these cases than that confronting the *Absaroka* when it was decided to abandon the voyage.

At the time of the decision to abandon the voyage, appellant reasonably anticipated either a direct requisition of its vessel by the government or (what would be tantamount to requisition) a direction and control of the vessel's movement requiring her services in more essential routes. (T. 100.) It was common knowledge in this country, particularly in the steamship industry, that at the outbreak of the war there was a dire shortage of ships of all kinds. That any vessel able to float would be required by the government to aid in the prosecution

of the war would appear to have been an accepted fact. That the Absaroka was in fact acquired by the government on completion of repairs, under an arrangement which the District Court in its opinion considered to be in effect a requisition, is relevant in pointing out the reasonableness of appellant's belief (WSA wire, Exhibit 3 to pre-trial order in both cases; T. 25). The authorities previously referred to establish that frustration may result from anticipated governmental interference as well as from actual governmental interference.

The District Court, in its findings and opinion (T. 53, 42-A. 38), states that appellant, in abandoning the voyage, relied primarily on the delay in repairs. While the delay in repairs is emphasized by Mr. Lunny in his testimony, the other factors mentioned and discussed herein must also be given due and proper weight. The question is not what Mr. Lunny emphasized, but what facts were considered in abandoning the voyage. However, even if we were to ignore the other grounds which are sufficient to justify abandonment, the prospect of indefinite delay in effecting repairs, as viewed under the conditions existing on February 5, 1942, is ample basis to support appellant's position.

The vessel was first placed in dry dock for examination on January 18, 1942, and a contract was negotiated with Bethlehem Steel Company under an offer dated January 22, 1942 (T. 25-A. 28). This contract gave appellant no assurance as to when, if ever, the repairs would be accomplished. It was expressly understood that all repair work would be based on priorities, that any time the yard was required to use its labor and materials on

vessels of the Army, Navy or War Shipping Administration, or to perform any work considered more essential to the war effort, the Absaroka would be required to lie idle, and that if the Absaroka occupied a dry dock which was required by a more essential vessel, she would be removed and work on her suspended until the work on the more essential vessel had been completed (T. 94). Considering the common knowledge in this country of the shortage of repair facilities in the early part of the war, and indeed throughout the war, it is plain that these conditions of the contract were no idle jest, and that appellant could not conceivably anticipate the time required to complete the repairs. While the repairs were actually completed in 110 days (T. 93), appellant's officers reasonably thought "it could well be a matter of months and months" (T. 102).

The situation with respect to the delay in repairs is not unlike that presented in *Jackson v. Union Marine Insurance Co.*, 31 L.T. 789, 2 Asp. M.C. 435. A vessel under charter left Liverpool January 2, 1872, for Newport, where she was to load a cargo of rails to be transported to San Francisco. She ran aground January 3, 1872, got off February 18, and, although sold without accomplishing repairs, it is estimated that she could have been repaired by July 1. The court, in holding that the venture was frustrated and the owner justified in abandoning the voyage, considered the delay such as would make any resumed voyage an entirely different one from that originally undertaken, stating:

"The time necessary to get the ship off and repair her so as to be a cargo-carrying vessel was so long as to put an end in a commercial sense to the

commercial speculation entered into between the shipowner and charterer.”

There is every indication in the *Jackson* case that the duration of repairs could be predicted with reasonable certainty, a factor non-existent in the case presented in this appeal.

Lord Finlay, speaking for the House of Lords in *Bank Line, Ltd. v. Arthur Capel and Co.* (H. of L. 1919) A.C. 435; 14 Asp. M.C. 370 at 372, said, in holding a charter frustrated by delay resulting from requisition where the vessel was released from the requisition after five months,

“A charter for 12 months from April is clearly different from a charter for twelve months from September. In such a case the adventure contemplated by the charter is entirely frustrated * * * the owner is entitled to say that the contract is at an end on the doctrine of frustration of the adventure.”

The District Court considered Paragraph 9 of the bill of lading that “Carrier is not and shall not be required to deliver said packages at the port of discharge or port of destination at any particular time, or to meet any particular market, or in time for any particular use” and a similar provision in Section VI(a) of Official West Coast Standard Sales and Shipping Practices (Exhibit 2) as in effect, estopping appellant from urging delay as a grounds for abandonment. (T. 43.) But the delay referred to in these provisions is ordinary and reasonable, such as is occasioned by minor crew or stevedoring troubles, engine breakdowns, storms and the many other matters which are the plague of steamship operators and which may be reasonably contemplated by the par-

ties, *not* the unreasonable, indefinite and inordinate delay with which appellant was actually confronted.

The situation is analagous to that referred to by the Court of Appeal in *Admiralty Shipping Co. v. Weidner*, 13 Asp. M.C. 539, (King Bench Division decision cited above). This case involved a charter for a "Baltic round" (a round trip between England and the Baltic Sea). Baltic ports were blockaded when war broke out. The charterer had the option of cancelling the charter, "in event of Great Britain or other European Powers being involved in war affecting the working of the steamer." Charterer sent notice of cancellation. The shipowner, on the other hand, claimed commercial frustration entitling it to the charter hire. The charterer then contended that the quoted provision precluded frustration under the circumstances. The court held with the shipowner stating that the option clause meant a condition which would only *partially* affect the working of the steamer, but did not contemplate complete impossibility such as resulted from the blockade. The court said, page 548:

"The construction of the clause is not free from difficulty, but, having regard to the language used, it appears to me not to apply at all in the events which have happened. * * * To speak, therefore, of the charterer's option to take one or other of those courses is to speak of * * * a temporary affecting of the working of the steamer as opposed to something of so serious a character as to prevent any working of the steamer at all for a period sufficient to amount to a frustration of the adventure. Assuming this construction of this clause to be correct, it practically disposes of any argument on the second branch of this question, *because if the parties have deliberately re-*

stricted the expressed provisions of the charter-party to some temporary interruptions by reason of war, they cannot be assumed to have excluded the implied condition which would come into operation in the event of the more serious interruption taking place.

For purposes of emphasis we have considered each of the major considerations in abandonment of the voyage of the Absaroka separately, and have shown that each is sufficient to constitute commercial frustration and entitle appellants to the benefits of the earned-freight clause. Considering the combination of circumstances at the time of abandonment, the unpredictable time when the vessel which had been practically destroyed would again be able to sail, the reasonable anticipation that, even when ready, she would be either directly requisitioned or otherwise controlled by the government, the then-known danger and hazards of a voyage through submarine-infested waters without benefit of convoy, together with the more minor, but nevertheless weighty, problems in connection with the lumber cargo, including shortage of labor to handle it, the Coast Guard orders requiring extra guards for fire protection and limiting the height to which the lumber could be piled in the yard, necessitating piling the oil- and sea-water-damaged lumber in such a way as to progressively increase its deterioration (T. 96, 97), without doubt there was a commercial frustration of the venture justifying appellant in abandoning the voyage and retaining the freight from the proceeds of the sale of the lumber pursuant to the earned-freight clause of the bills of lading.

CONCLUSIONS

We respectfully submit that the obligation of Appellee Guernsey-Westbrook Company to pay the freight charges is not conditioned upon delivery of the lumber at destination, and that the sales contract consisting of the orders and acceptances is not in conflict with the earned-freight clause of the bill of lading. The circumstances confronting Appellant were such as to constitute commercial frustration of the adventure, justifying abandoning the voyage and retaining the freight charges due from each appellee in accordance with the valid terms of the earned-freight clause. Accordingly, it is respectfully requested that the Decree and the judgment of the District Court, which are contrary to this position, be reversed in their entirety.

Respectfully submitted,

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Dated: July 6, 1946

(Appendix Follows)

APPENDIX
Assignments of Error Relied Upon

II

The District Court erred in finding that on February 5, 1942, Respondent had sufficient facts upon which to base a determination to abandon the voyage and to justify an abandonment.

III

The District Court erred in failing to find that on February 5, 1942, Respondent had sufficient facts upon which to base a determination to abandon the voyage and to justify the abandonment.

IV

The District Court erred in finding that the lumber which remained on the docks for more than five (5) months after it was unloaded from the Absaroka did not sustain any damage or deterioration and further erred in failing to find that a large portion of said lumber cargo was oil-soaked as a result of the torpedoing.

XII

The District Court erred in failing to find and conclude that the following grounds or any of them constituted commercial frustration justifying Respondent's determination to abandon the voyage of the steamship Absaroka on February 5, 1942, and to find that all of such grounds existed:

(1) That at the time of Respondent's determination to abandon the voyage, there was a great peril from Japanese submarine activity and many vessels were being torpedoed on the West Coast;

(2) That at the time of Respondent's determination to abandon the voyage, it was reasonably anticipated that at the time repairs to the steamship Absaroka would be completed—such time being uncertain—there would be great peril from Japanese submarine activities on the West Coast of the United States;

(3) That at the time of Respondent's determination to abandon the voyage, there was an increase in the torpedoing of vessels on the East Coast of the United States and in the Caribbean Sea by reason of German submarine activity;

(4) That at the time of Respondent's determination to abandon the voyage, it was reasonably anticipated that at the time repairs to the steamship Absaroka would be completed—such time being uncertain—the torpedoing of vessels on the East Coast and in the Caribbean Sea by German submarine activity would not be diminished;

(5) That at the time of Respondent's determination to abandon the voyage, no intercoastal voyages were being undertaken, and that it could be reasonably anticipated that at the time the repairs to the steamship Absaroka would be completed—such time being uncertain—no intercoastal voyages would be undertaken;

(6) That at the time of Respondent's determination to abandon the voyage, it was impossible to predict the length of time required to complete repairs on the steamship Absaroka because of priority of Army, Navy, and War Shipping Administration vessels in obtaining repairs ahead of commercial vessels, such as the Absaroka;

(7) That at the time of Respondent's determination to abandon the voyage, there was a strong probability

that, on completion of the repairs to the steamship Absaroka, the vessel might be requisitioned by the Government for the uncertain duration of the war;

(8) That at the time of Respondent's determination to abandon the voyage, there was a strong probability that, at the time of completion of repairs to the steamship Absaroka, the vessel might be required by the Government to proceed in some direction other than intercoastal;

(9) That at the time of Respondent's determination to abandon the voyage, there was a strong probability that, at the time of completion of repairs to the steamship Absaroka, there would be no convoy available;

(10) That at the time of Respondent's determination to abandon the voyage, there was a strong probability that, at the time the repairs to the steamship Absaroka would be completed, the damage to the cargo by oil and salt water would be such as to make it worthless cargo;

(11) That at the time of Respondent's determination to abandon the voyage, there was insufficient labor available to properly pile the lumber to protect it from fire and deterioration, and it could be reasonably anticipated that such condition would continue;

(12) That at the time of Respondent's determination to abandon the voyage, the Respondent knew that, before the voyage could be resumed, there would be a long period of storage, and the costs of storage would be excessive;

(13) That at the time of the Respondent's determination to abandon the voyage, the United States Coast Guard required Respondent to employ watchmen to guard

and protect the lumber from fire resulting from the soaking of the lumber by oil, which costs would be excessive.

XIII

The District Court erred in failing to find that the factors enumerated in paragraph XII above did not exist at the time the contract to transport Libellant's lumber was made.

XIV

The District Court erred in finding and concluding that there was no commercial frustration of the voyage of the steamship Absaroka from St. Helens, Oregon, to Philadelphia, Pennsylvania, which justified the abandonment of the voyage at Los Angeles.

XVI

The District Court erred in finding and concluding that Respondent is not entitled to retain the freight on the lumber which remained on the vessel when the Absaroka was towed into San Pedro.

Nos. 11,320 and 11,321

United States
Circuit Court of Appeals
For the Ninth Circuit

POPE & TALBOT, INC., a corporation,
Appellant,

vs.

GUERNSEY-WESTBROOK COMPANY,
a corporation,
Appellee.

POPE & TALBOT, INC., a corporation,
Appellant,

vs.

BLANCHARD LUMBER COMPANY OF SEATTLE,
a corporation,
Appellee.

BRIEF FOR APPELLEES

FILED

AUG 3 - 1946

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POPE & TALBOT, INC., a corporation,
Appellant,

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POPE & TALBOT, INC., a corporation,
Appellant,

vs.

BLANCHARD LUMBER COMPANY OF SEATTLE,
a corporation,
Appellee.

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

The Appellant, Pope & Talbot, Inc., sold lumber to Appellee Guernsey-Westbrook Company and to Appellee Blanchard Lumber Company for transportation on the Absaroka, owned and operated by Appellant. Appellant

contends that it is entitled to the freight it was to earn for transporting the lumber from St. Helens, Oregon, to Brooklyn, New York, and Philadelphia, Pennsylvania, notwithstanding the lumber was discharged at San Pedro, California. The vessel put into port at San Pedro for repairs after being torpedoed by a Japanese submarine. Appellant thereafter gave notice of abandonment of the voyage which Appellees protested. Appellant contends that it was justified in abandoning the voyage and entitled to full freight notwithstanding the abandonment by reason of an earned freight clause in the bills of lading under which the lumber was shipped.

Following the abandonment of the voyage the lumber was sold pursuant to agreement, without prejudice to the rights of Appellees to maintain that the voyage had been wrongfully abandoned and that no freight was due (*Tr. of Rec.*, p. 27; *Apostles on App.*, p. 29). From the proceeds of sale Pope & Talbot, Inc. deducted the full freight for transportation from St. Helens, Oregon, to the east coast ports to which the lumber was consigned. To recover the amounts withheld for freight the Appellee Guernsey-Westbrook Company brought suit on the law side of the court and Appellee Blanchard Lumber Company filed a libel in Admiralty. The cases were tried together. Judgment was rendered for Guernsey-Westbrook Company for \$10,543.85 and in favor of Blanchard Lumber Company for \$4,296.13.

The trial court held that Pope & Talbot, Inc. was without justification in abandoning the voyage at San Pedro and for that reason not entitled to freight under the earned freight clause in the bills of lading. The trial court further held in the case in which Guernsey-West-

brook Company was plaintiff that under an express provision in the contracts of sale no freight was due unless the lumber reached Brooklyn. The contracts provided "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER." The question as to the interpretation of this provision is involved only in the case in which Guernsey-Westbrook Company is plaintiff.

The trial court rejected the further contention of Appellees that no freight was due under the earned freight clause in the bills of lading for the reason that the clause was optional and the option had not in fact been exercised before the vessel was torpedoed. Having rejected this contention, the trial court permitted Pope & Talbot, Inc. to retain \$26.59, which represented freight on that portion of the lumber purchased by Blanchard Lumber Company which had been washed overboard and never recovered. As to that lumber Appellant could not lose its right to freight by failure to resume the voyage. A similar allowance was not made in the Guernsey-Westbrook Company case because the court construed the provision in the contracts for the sale of the lumber—"OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER"—as making liability for freight conditional upon the arrival of the lumber in Brooklyn.

In a footnote on page 6 of its brief Appellant says that the question whether the earned freight clause was optional "is not involved in this appeal." Appellant is under a misapprehension. The trial court decided this point against the Appellees. But if this court is of the view that the judgment can be affirmed only on the ground that the earned freight clause was optional, then Appellees are

entitled to an affirmance on that ground and, indeed, under the decision in *The John Twohy* (1921) 255 U. S. 77 the Appellee Blanchard Lumber Company would be entitled to a reversal of the judgment in so far as it permitted Pope & Talbot, Inc. to retain the sum of \$26.59. In the cited case it was held that upon an appeal by a party to an admiralty suit the nonappealing party may challenge the judgment in so far as it is adverse to him. Certainly, then, a nonappealing party may support a judgment in its favor on any ground presented by the record of proceedings in the trial court.

Appellee Blanchard Lumber Company would not presume to take the time of this court in consideration of an item so small as \$26.59. Appellees do urge, however, that the question of the optional character of the earned freight clause has not been eliminated from these cases; that if this court should be of the view that the trial court erred in the points decided in favor of Appellees then this court must consider whether Appellees are entitled to an affirmance on the ground, as contended for by them, that the earned freight clause was optional.

ARGUMENT**I.**

IN THE GUERNSEY-WESTBROOK COMPANY CASE AN EXPRESS PROVISION OF THE CONTRACTS UNDER WHICH THE LUMBER WAS SOLD PRECLUDES APPELLANT FROM RELYING ON THE EARNED FREIGHT CLAUSE IN THE BILLS OF LADING.

As appears from the facts stated in Appellant's brief, Orders for lumber received from Guernsey-Westbrook Company and Acceptances thereof executed by Pope & Talbot, Inc. together constituted contracts for the sale of lumber. The Acceptance included provisions as follows:

“PRICES AS NOTED ABOVE PER M' B.M.C.I.F.
END OF SHIP'S SLINGS BROOKLYN, N.Y.
TERMS: OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER: BALANCE 98% SIGHT DRAFT WITH DOCUMENTS ATTACHED, INCLUDING NEGOTIABLE BILL OF LADING TO ORDER OF MARINE MIDLAND TRUST CO. OF NEW YORK.”

The letters M'B.M. are an abbreviation for thousands of feet board measure. The TERMS provision quoted above appears also on the invoices for the lumber sold Guernsey-Westbrook Company. On the reverse side of the Acceptance are printed “TERMS AND CONDITIONS OF SALE”, A - G. E provides:

“E. Any government tax, state or federal, or any change in freight rate effective after date of this order and before shipment shall be for purchaser's account.”

On the invoices is the typed statement:

“Price based on existing ocean freight rate of \$16.00 per M’ net.”

F is as follows:

“F. In the case of intercoastal shipments all terms of the steamship bill of lading are made a part of this contract.”

Although the Acceptances contemplated shipment in a vessel of Appellant, the Absaroka or West Portal, the bills of lading which Appellant proposed to use for shipping the lumber are not set forth nor otherwise identified than by the reference in E of the terms and conditions of sale.

The earned freight clause of the bills of lading is as follows:

“Full freight to destination on weight or measurement at Carrier’s option at declared rates (unless otherwise agreed) and all advance charges against the Goods are due and payable to the Carrier at its option upon receipt of the Goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost. * * *.” (Exhibit 1 to Pre-trial Stipulation in case No. 11320 and case No. 11321.)

The Pretrial Order recited that prior to the commencement of the voyage Pope & Talbot, Inc. secured sufficient marine and war risk insurance to cover all freight on all cargo on the Absaroka (Tr. of Rec., p. 28; Apostles on App., p. 31). The printed Transcript of Record, page 33, erroneously sets forth the District Court's Memorandum Opinion and Order for Judgment to read: "To cover all freight *and* all cargo on board the Absaroka.")

It is our position that the provision "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER" makes arrival of the goods a condition precedent to liability for freight; that unless the goods arrive at destination no freight is due; that in so far as the printed earned freight clause of the bills of lading is in conflict with the typed provision of the Acceptances the Acceptance provision prevails.

The trial court held that the Acceptance provision was ambiguous; that in the light of settled rules of construction, to which reference will be made hereafter, the provision should be construed as contended for by Appellees; that the earned freight clause of the bills of lading was in conflict with the Acceptance provision as thus construed; and that under the decision in *Toyo Kisen Kaisha v. W. R. Grace Co.* (C.C.A. 9, 1931) 53 F. 2d 740, the Acceptance provision prevailed.

A.

It Does Not Follow From the Fact That the Sales Were on C.I.F. Terms That Appellant Is Entitled to Freight.

Where the carrier fails to deliver the goods at destination neither seller nor carrier is entitled to freight from

the buyer solely by virtue of the fact that the sale is on c.i.f. terms.

Pope & Talbot, Inc. seems to contend in this court, as it did in the trial court, that the circumstance that the sales to Guernsey-Westbrook Company were described as c.i.f. sales in the Acceptances supports its position that it is entitled to freight, although the lumber was not transported to destination. On page 10 of its brief Appellant says:

“These cases support the position * * * that the buyer, under a C.I.F. contract, not only has the risk of loss of goods in transit (for which insurance is taken out in his name), but also, as between buyer and seller, has the obligation to pay the freight charges irrespective of delivery”.

On page 11 Appellant says that the decision of the District Court “that delivery was a necessary condition to the payment by the buyer of the freight charges” is “contrary to the rule in c.i.f. sales”. This contention calls for an analysis of c.i.f. sales. In the present case Pope & Talbot, Inc. appears in the dual capacity of seller and carrier. Let us first consider the relationship between buyer and seller under a c.i.f. sale where the seller is not also the carrier.

Where a sale is on c.i.f. terms the price quoted includes charges for insurance and freight. The seller procures and pays for insurance to protect the buyer and arranges for transportation. The seller either prepays the freight or, if the goods are shipped collect, freight to be paid by the purchaser on arrival, the charge for freight is deducted from the amount payable to the seller by the purchaser. It is usually provided in the contract of sale that

payment of the purchase price (less freight where the goods are shipped collect) is to be made against documents, which are likely to reach the buyer before the goods. These and other general principles concerning sales on c.i.f. terms are discussed in

Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co. (C.C.A. 2, 1945) 147 F. (2d) 399, 402;

Gamboa, Rodriguez, Rivera & Co., Inc. v. Imperial Sugar Co. (C.C.A. 5, 1942) 125 F. (2d) 970, 971;

Warner Bros. & Co. v. Israel (C.C.A. 2, 1939) 101 F. (2d) 59, 60;

1 *Williston on Sales* (2nd ed.), pp. 605-617, §§ 280c-280f;

Vold on Sales, pp. 216-223;

32 *Yale Law Journal* 711;

7 *Words and Phrases* 169.

In the ordinary c.i.f. sale where the seller is not also the carrier the risk of loss during transportation is on the purchaser, in whom title vests on delivery to the carrier. The purchaser must pay the seller for the goods, notwithstanding their loss en route or nondelivery at destination. (Authorities cited *supra*.) But the carrier will not be entitled to freight where the cargo is not delivered at destination unless the contract of affreightment which the seller has made with the carrier includes an earned freight clause or a provision of like import. And where the goods sold under c.i.f. contract have been shipped freight collect, if the carrier is not entitled to freight the buyer is not liable therefor to the seller. As between buyer and seller where freight has been prepaid by the seller it may well be that the buyer must pay the seller the full purchase price,

including freight, leaving the buyer to assert against the carrier any claim for return of prepaid freight arising from the carrier's failure to make delivery.

If the bill of lading includes an earned freight clause, but as between seller and buyer the seller was not authorized to arrange for transportation on such terms, the carrier nevertheless may have a right to freight as against the seller under its contract made with the seller for the transportation of the goods. But as between the buyer and the seller it would seem clear that the buyer is not liable for freight on the undelivered shipment where the earned freight clause was unauthorized and probably not liable for any part of the purchase price, since the seller did not conform to the contract of sale. (1 *Williston on Sales* (2d Ed.), p. 616; *Vold on Sales*, pp. 219-220.)

The purpose of the above discussion is to make it plain that it is not an incident of a c.i.f. sale that the *carrier* is entitled to freight notwithstanding the goods are not delivered at destination, nor that the *seller* is entitled to receive the full purchase price from the buyer in such event without deduction for freight. The carrier's right to freight will depend on whether the contract of affreightment gives it that right notwithstanding nondelivery. The buyer's liability to the seller for the full purchase price, including freight, will depend on whether the carrier is entitled to freight under the contract of affreightment and on whether, as between buyer and seller, the seller was authorized to arrange for transportation on such terms.

We have said above that in the absence of a special provision in the contract of affreightment the carrier who fails to deliver cargo at destination will not be entitled

to freight. C.i.f. contracts were first used in England (1 *Williston on Sales* (2d ed.) 605). The decision in *Ireland v. Livingston*, L.R. 5, H.L. 395 (1872) is widely cited in general discussions of c.i.f. contracts. In that case it is said:

“The terms at a price ‘to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents,’ are very usual, and are perfectly well understood in practice. The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premiums of insurance and the freight, as the case may be), and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee, which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charter-party, bill of lading, and policy of insurance. Should the ship arrive with the goods on board, he will have to pay the freight, which will make up the amount he has engaged to pay. *Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight*, and he will recover the amount of his interest in the goods under the policy. If the nondelivery is in consequence of some misconduct on the part of the master or mariners not covered by the policy, he will recover it from the shipowner.” (Italics added.)

For the proposition that the seller has no right to freight if the carrier is not entitled to freight we need only refer to *Gamboa, Rodriguez, Rivera & Co., Inc. v. Imperial Sugar Co.* (C.C.A. 5, 1942) 125 F. 2d 970, certiorari denied 316 U.S. 691, 86 L. Ed. 1762, cited by Appellant. The seller of sugar under a c.i.f. contract shipped the

sugar from the Philippine Island for Galveston, Texas on three German vessels, which put into ports short of destination and discharged the sugar upon the outbreak of the war. In order to obtain possession of the sugar for transshipment the buyer, upon demand of the carrier, paid full freight to destination. Both the seller and the buyer filed libels against the carrier to recover freight paid by the buyer. The carrier conceded its obligation to refund the freight and deposited \$32,541.75 in court. Judgment for the buyer was affirmed. Had the seller been entitled to freight notwithstanding nondelivery judgment would have been for the seller.

In deciding for the buyer the court said:

“Appellant’s position will not be sustained. Gamboa has, in fact, realized every cent it expected to receive or to which it was entitled under the contract. It has been paid for the sugar and the insurance, and has been relieved of its freight obligations. When it shipped the sugar, and forwarded the proper documents to Imperial, its obligations under the contract were at an end. From that moment the buyer alone stood to lose on the ventures. The buyer, Imperial, was the one who was interested in receiving the sugar at its agreed destination, and when the voyages were broken up, it paid the freight charges, and it with the insurance carriers suffered the expense, risk, and inconvenience incident to the transshipment of the undelivered cargoes. No cases are cited, and we have found none dealing with a situation of this kind, but we think that the principles of fair play and justice sustain the judgment awarding the contested sum to Imperial.”

The above discussion has been directed more particularly to the situation where the seller is not also the carrier,

as in the Guernsey-Westbrook case here involved. It has been pointed out that the rule is that under a c.i.f. sale the risk of loss during transportation is on the purchaser. Where the c.i.f. seller is also the carrier by water it assumes obligations during transportation which to a degree are controlled by statute, the Harter Act (46 U.S.C.A., §§ 191-195) where the shipment is in domestic trade and the Carriage of Goods by Sea Act (46 U.S.C.A., §§ 1300-1315) where the shipment is in foreign trade. These statutes restrict a carrier's right to contract for exemption from liability for nondelivery of cargo, and it must follow that if nondelivery is due to a cause for which the statute imposes liability, the seller-carrier is liable notwithstanding the sale is c.i.f., and in such event may not collect freight on the goods under an earned freight clause in its bill of lading. This is not to suggest that Pope & Talbot, Inc. as carrier would be liable for the value of the lumber if it had been lost when the ship was torpedoed by enemy action. The statute does not impose liability on a carrier for loss of cargo under such circumstances. At this point we are merely discussing the matter to bring out the nature of the relationship between a purchaser and a seller under a c.i.f. sale who is also the carrier.

As in the case of a c.i.f. sale by a seller who is not also the carrier, the right of the seller-carrier to freight in the event the goods are lost or the voyage broken up will depend on the contract. A c.i.f. provision in a contract between a buyer and a seller who engages also to transport the goods sold as a carrier does not operate as an earned freight clause, or as an authorization to the seller

to ship under a bill of lading including such clause. As in the case of a carrier who is not also the seller, it is our position that where the seller under a c.i.f. sale itself agrees to transport the goods to destination as carrier, its right to freight in the event of nondelivery depends on whether it was authorized by the buyer to transport the goods under a bill of lading including an earned freight clause and on whether it has in fact done so. Fundamentally, freight is a recompense for a service performed—delivery of the goods at their destination.

The Tornado (1883), 108 U.S. 342, 347, 27 L. Ed. 747;

Toyo Kisen Kaisha v. W. R. Grace & Co. (C.C.A. 9, 1931), 53 F. 2d 740, 742;

The Gracie D. Chambers (C.C.A. 2, 1918) 253 Fed. 182;

Jordan et al. v. Warren Ins. Co., Fed. Cas. No. 7524;

Robinson on Admiralty, pp. 584-592;

58 C. J., p. 500, § 829.

The carrier in the absence of a special agreement must complete its contract before it earns its freight. This is so even though its inability to deliver at destination arises from circumstances beyond its control.

To summarize our discussion under this heading, we would emphasize that the carrier who undertakes to transport goods sold under a c.i.f. sale, whether or not it is also the seller of the goods, is not entitled to freight in the event of failure to deliver at destination unless it has contracted for freight under such circumstances by clear and unequivocal contract. As between buyer and seller, if the carrier is not entitled to freight because it has not

contracted for it in such circumstances, or if an earned freight clause has been included in the contract of affreightment without express or implied authorization of the buyer, the buyer is entitled to a deduction from the agreed purchase price of the amount of unearned freight. In the event the inclusion of an earned freight clause in the contract of carriage was unauthorized the purchaser probably may repudiate the sale altogether.

B.

In the Event of a Conflict Between the Typewritten Provisions of the Acceptances and the Printed Earned Freight Clause in the Bills of Lading the Acceptance Provision Must Control.

Appellant contends that the Acceptance provision and the earned freight clause should be interpreted as non-conflicting. But it seems also to suggest somewhat obliquely that in any event its rights as *carrier* should not be affected by the provisions of the Acceptance, but should be determined on the basis of the bill of lading alone. In opening its argument on page 8 Appellant says:

“There are two contracts involved: (1) a contract of sale between appellant’s lumber division as seller and appellee Guernsey-Westbrook Company as buyer, the buyer obligating itself to pay the freight as part of the purchase price irrespective of delivery at destination; and (2) a contract of affreightment between the lumber division as agent for the buyer and McCormack Steamship Company Division of Appellant.”

On page 21 of the Opening Brief is the following:

“The decision in the T.K.K. [Toyo Kisen Kaisha v. W. R. Grace & Co.] as appears from the above

quotations, stresses the marginal notations in the bills of lading that freight is 'per agreement' or 'as agreed'. No such marginal notation appears on the bills of lading in our case. The lack of such marginal notation is further evidence that Pope & Talbot, Lumber Division, was acting as seller and did not consider its *contract with the buyer* as being a part of the *bill of lading contract* subsequently made *on behalf of the buyer* with the McCormack Steamship Company Division, as carrier.

"Terms in an affreightment contract cannot be used to construe terms in a sales contract. The bill of lading and the sales contract are not in conflict. If Pope & Talbot, acting as seller, performed its obligations under the sales contract, the buyer, thereafter assumed all risks and obligations including the obligation to pay the freight, and, under the earned freight clause, the carrier is entitled to retain the freight." (Italics added.)

The suggestion that the lumber division of Pope & Talbot, Inc. acted as agent for the buyer in arranging for transportation by the shipping division of Pope & Talbot, Inc. is quite artificial. Upon the execution of the Acceptances there came into existence contracts by which Pope & Talbot, Inc. agreed to sell lumber and to transport such lumber on a vessel owned by it, either the Absaroka or the West Portal. We must take issue emphatically with any suggestion that the rights of Pope & Talbot, Inc. to freight depend on the terms of the bills of lading alone. Any provision of the bills of lading which is in conflict with the special typewritten provisions of the contracts is a violation of the contracts and not binding upon Appellee Guernsey-Westbrook Company.

This is so whether the contract created by the execution of an Acceptance is to be described as a contract of sale and affreightment or as a contract of sale only, as Appellant contends. A c.i.f. contract of sale may fix the terms on which insurance is to be procured and transportation arranged. Where the seller is itself the carrier it will not, of course, be entitled to freight under an earned freight clause inserted in the bill of lading in violation of the contract of sale, and no interdepartmental division of the seller's sales and shipping functions will give it this right. In our view the inclusion by Pope & Talbot, Inc. in its bills of lading of an earned freight clause was in direct violation of the provision of the contracts: "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER".

C.

The Acceptance Provision "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER" Means That No Freight Is to Become Due Unless the Goods Are Delivered at Destination.

(1) Well Settled Rules of Interpretation of Contracts Compel This Conclusion.

(a) A contract whereby the carrier stipulates for full freight to point of destination although he is unable to carry the goods there, should be expressed in clear and unequivocal language.

Benner v. Equitable Safety Insurance Company
(1863) 88 Mass. 222, 224;
58 C. J., p. 514, § 856.

If there is any uncertainty or ambiguity, a contract of affreightment, whether evidenced by a bill of lading alone or by a bill of lading plus other documents, should

not be construed as giving the carrier the right to a recompense which in its nature is for a service performed where that service has not been performed. In England the rule was established that if prepaid freight was provided for the carrier was entitled to retain it if the goods were lost without his fault.

Byrne v. Schiller (1871) L.R. 6 Exchequer 319;
Smith, Hill & Co. v. Pyman, Bell & Co. (1891)
 1 Q.B. 742;
Robinson on Admiralty, p. 590, § 82.

But in this country the rule is otherwise. Only pursuant to special contract can the carrier retain freight, even prepaid freight, where the goods are not delivered at destination.

The Tornado (1883) 108 U.S. 342, 27 L. Ed. 747;
Burn Line v. U. S. & A. S. S. Co. (1908) 162 Fed.
 298;
Palmer v. Lorillard, 16 Johns. (N.Y.) 348.

(b) The provision of the Acceptances for payment of freight on arrival is in language framed by Pope & Talbot, Inc., and that company's bill of lading containing the earned freight clause is a form document in the drafting of which the purchasers had no part. Hence uncertainty is to be resolved against Pope & Talbot, Inc.

Texas & Pacific Railway Co. v. Reiss (1902) 183
 U.S. 621, 46 L. Ed. 358;
Grace v. American Central Ins. Co. (1883) 109
 U.S. 278, 27 L. Ed. 932;
Northern Pac. Ry. Co. v. Twohy Bros. Co. (C.C.A.
 9, 1938) 95 F. 2d 220, 223;

Standard Oil Co. of California v. United States,
 59 F. Supp. 100, 105;
 17 C. J. S., 751, § 324;
 12 Am. Jur., 795, § 252;
Am. Law Inst. Restatement, Contracts, Vol. 1,
 § 236(d).

(c) The rights of the parties are to be determined with reference to the rule that in event of a conflict between written or typed provisions and printed provisions of a contract, the typed provisions control.

New York Life Ins. Co. v. Hiatt (C.C.A. 9, 1944)
 140 F. 2d 752;
Deutsche v. Wilson, 39 F. 2d 406;
 17 C. J. S., 728, § 310;
 12 Am. Jur., 797, § 253;
Am. Law Inst. Restatement, Contracts, Vol. 1,
 § 236(e).

The Acceptance provision for payment of freight on arrival at destination is typed. The provision of the Acceptance by which the bill of lading is made a part of the contract and the earned freight clause of the bill of lading are printed.

(d) There is a further aid in the interpretation of the documents herein—the conduct of the parties under the contracts.

Holbrook v. Petrol Corporation (C.C.A. 9), 111 F.
 2d 967;
Starr v. Superheater Co., 102 F. 2d 170;
 17 C. J. S., 755, § 325;
 12 Am. Jur., 787, § 249;
Am. Law Inst. Restatement, Contracts, Vol. 1,
 § 235.

In the oft quoted language of Lord Chancellor Sugden, "Tell me what you have done under a deed, and I will tell you what that deed means." (*Attorney-General v. Drummond*, 1 Dru. & Walsh, 353; 2 H. L. Cas. 837, as quoted in *Keith v. Electrical Engineering Company*, 136 Cal. 178, 181, 68 Pac. 598, 599). What did Pope & Talbot, Inc. do when it shipped the lumber for which it here claims full freight? It insured the freight charges in its own favor against marine risks and war risks. The pre-trial order in the case in which Guernsey-Westbrook Company is plaintiff includes the following:

"Defendant Pope & Talbot, Inc. secured sufficient marine and war risk insurance to cover all freight on all cargo on board said Absaroka on the voyage in question, all of which freight for all cargo on said vessel was approximately \$80,000. The Insurance Company is contesting its obligations under the war risk insurance on all cargo on the vessel, on grounds not pertinent to the present cases." (Tr. of Rec., p. 28.)

Since Pope & Talbot, Inc. insured the freight charges in its own favor at its own expense, the implication is that it did not include insurance of the freight charges in the coverage procured for the purchasers in performance of its c.i.f. contracts. (The acceptances provided that the buyer was to insure for war risk, but this still left it the duty of the seller to obtain coverage for the buyers against marine risks.) In the absence of any explanation by Pope & Talbot, Inc. as to any other reason for procuring insurance of the freight charges in its own favor, the only reasonable inference is that it believed it would not be entitled to the freight in the event the goods did not reach their destination.

- (2) *The Decision in Toyo Kisen Kaisha v. W. R. Grace & Co.*
(C.C.A. 9, 1931) 53 F.2d 740, Is Directly in Point in Favor of
Appellee's Construction.

In this case the seller and the carrier entered into an oral agreement in San Francisco, later confirmed by letter, for the shipment of nitrate of soda from a Chilean port to the seller's customer in Honolulu. Freight was to be paid at a rate per long ton, gross weight delivered. The letter read, "Freight payable in San Francisco on receipt of weights from Honolulu." The two bills of lading issued for the cargo omitted freight rates but provided that freight was "to be paid, as per margin in DESTINATION." (It appears from an examination of the record in the case (the Judgment Roll) that the provision that freight was "to be paid as per margin in" was printed and that the word "DESTINATION" was typed in the blank space following.) On one bill of lading was the typed marginal notation "Freight as per agreement", on the other "Freight as agreed." It does not appear from the opinions that these notations were directly opposite the printed earned freight clause of the bills of lading, and an examination of the record in the case reveals that they were not. The bills of lading included an earned freight clause as follows: "Said freight to be considered as earned, lost or not lost." The cargo was lost when the vessel was destroyed by fire at sea.

The contract provision in that case—"Freight payable in San Francisco on receipt of weights from Honolulu"—is certainly no clearer nor more explicit than the provision herein—"OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER." The District Court deemed the meaning of the provision in the cited case so plain that

it virtually assumed without discussion in its opinion that under it no freight was payable unless the cargo reached Honolulu. The problem was what to do about the earned freight clause of the bills of lading. The District Court disposed of that question in the following paragraph:

“I am in accord with the contention of respondent, which is that the verbal agreement entered into and the letter confirming same written in San Francisco prior to the shipments of the nitrate from the Chilean ports constitute the agreement of affreightment, and that the bills of lading were merely receipts for the freight, given subsequently, and therefore, under the circumstances, are no part of the contract of affreightment. See *Northern Pacific Ry. Co. v. American Trading Co.*, 195 U. S. 439, 25 S. Ct. 84, 49 L. Ed. 269; *The Arctic Bird* (D.C.) 109 F. 167.” (48 F. 2d 850, 851.)

The carrier appealed. It was contended there, precisely as it is here, that the contract provision and the earned freight clause of the bills of lading should be construed together and reconciled; that there was no conflict between them if together they were construed as making freight payable after the goods reached Honolulu, provided the voyage was not frustrated en route, but not conditional upon their arrival there. The Circuit Court of Appeals in its opinion observed that while there was authority for the District Court's holding that the bills of lading under the circumstances were merely receipts, it was not necessary thus to limit them to determine the case; that conceding the bills of lading supplemented the special contract they could not “contradict or nullify it;” that under

the special contract no freight was due unless the cargo arrived (p. 742).

Appellant attempts to distinguish that case on the ground that there the contract was between seller and carrier. Here it is between seller-carrier and buyer. But we are unable to perceive that this makes a difference. The fact is that in both cases there was an arrangement with a carrier for transportation of goods. In the T.K.K. case the arrangement was between carrier and seller. Here it is between carrier and buyer because the carrier was itself the seller. The provision "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER" restricts the terms on which the seller as carrier may charge freight and any clause in the bills of lading in conflict with the provision is ineffective.

Appellant also contends that the T.K.K. case is distinguishable because there the bills of lading bore marginal notations: "Freight as per agreement" on one, and "Freight as agreed" on the other. The record in the case shows, however, that the notations were not placed opposite the earned freight clause of the bills of lading, and that the printed form of the bills of lading contemplated a marginal notation. It read that freight was "to be paid, as per margin in". Although the bills of lading in the Guernsey-Westbrook case did not bear a reference, marginal or otherwise, to the contracts of sale, sufficient has been said above, pages 15 to 17, to make it plain that any clause of the bills of lading which violated the Acceptance provision is invalid.

(3) The Cases Which Appellant Cites Are Too Unlike the Guernsey-Westbrook Case to Support Appellant.

A foreword before discussing the cases cited by Appellant—Appellant says:

“The bill of lading and the sales contract are not in conflict.” (P. 21.)

Appellant cannot escape the fact that to some extent at least, the Acceptance provision “OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER” is in conflict with the freight clause of the bills of lading. Under the Acceptance provision as interpreted by Pope & Talbot, Inc. it was without right to collect advance freight by including the amount thereof in the sight draft to be drawn under the contract. The freight clause, on the other hand, provides, “Full freight to destination on weight or measurement at Carrier’s option at declared rates (unless otherwise agreed) and all advance charges against the Goods are due and payable to the Carrier at its option *upon receipt of the Goods by the latter.*” (Exhibit 1 to Pre-trial Stipulation in case No. 11320.) This provision gives the carrier an option to demand that full freight be prepaid, or to include the amount of freight in the sight draft for the purchase price, but under the provision of the Acceptance Appellant would concede that the carrier has no such right.

We proceed now to analyze the cases cited by Appellant. In none of them was the seller also the carrier. In *Warner Bros. & Co. v. Israel* (C.C.A. 2, 1939) 101 F. 2d 59, the seller of sugar under a c.i.f. sale sued the buyer for a balance due on the purchase price. The quota for Philippine sugar under The Jones-Costigan Act was filled and

consequently it was necessary to place the sugar in a bonded warehouse when it arrived in New York. It is to be inferred that the sugar had been shipped freight collect as the opinion states that the seller's draft for 95% of the purchase price *less freight* had been honored. The suit evidently was for the remaining 5% of the purchase price.

The court did not consider the carrier's right to freight nor liability therefor as between buyer and seller. It would seem that the buyer must have paid the freight to the carrier to get possession of the sugar, since the opinion states that the sugar was placed in a bonded warehouse "by the defendant", who was the buyer. Doubtless the carrier was entitled to freight since it had actually delivered the sugar at New York to which it was consigned and the sugar had been discharged from the ship.

But as regards the seller, the buyer's position was that there was no delivery to him because of the governmental restrictions on the sugar, and hence that he was not liable to the seller for the balance of the purchase price. The buyer contended that the sale was not in fact a c.i.f. sale by reason of certain provisions in the contract. The contract provided that the price was to be based on several factors, including "net delivered weights"; that no sugar was to "be delivered" below 93 degrees unless on mutually satisfactory terms; and that "delivery" was to be tendered "ex-vessel" at a customary safe wharf or refinery. In rejecting the contention that by virtue of these provisions the sale was not a c.i.f. sale, the court said that these provisions dealt ". . . only with an adjustment of the purchase price and with a condition of the contract of affreightment to be arranged by the seller whereby the

carrier should take the sugar to a suitable discharging point to be designated by the buyer. They must be read in their context with the other terms of the contract and given such effect as the contract as a whole shows that the parties intended." (P. 61.)

The references to delivery in the Warner Bros. contract plainly did not mean that as between buyer and seller delivery to the buyer at destination was a condition precedent to the buyer's liability for the purchase price less freight. As has been said, the action concerned the seller's right to the purchase price, less freight. There was no provision postponing payment of the purchase price until arrival of the goods. There is such a provision in the Guernsey-Westbrook contract as concerns the freight, the provision "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER".

In *Boston Iron & Metal Co. v. Rosenthal* (1945) 68 Cal. App. 2d 564, 156, P. 2d 963, a contract for the sale of scrap steel provided:

" 'Price: Thirty Dollars (\$30.00) per gross ton, delivered Japan. Shipment: During month of May, June, July, August, 1937. Terms: All payment to be cash against the following documents: Certificate of weight, Mate's receipt that he has received the weight on the ship, prepaid freight bills, and invoices in duplicate. Remarks: Material to be loaded in vessel, insurable, under the nominal rates of insurance. Proper destination as to port delivery will be furnished upon advice as to the amount of tonnage you are ready to ship.' Under Boston Company's signature appears: 'Accepted: C. & F. Japan Accepted Ports. Wm. Rosenthal.' "

The purchaser brought an action to recover an alleged overpayment to the seller due in part to a shortage in weight of the scrap steel as delivered in Japan. The trial court had found that material of the weight shown on the shipping documents had actually been loaded, but that there was a shortage on arrival in Japan. It was held that the general rule applied that when nothing is stated as to place of delivery, delivery is complete to the buyer when made to a common carrier; that the provision "Thirty Dollars (\$30.00) per gross ton, delivered Japan" merely meant that the price was a "delivered Japan" price and did not indicate the point of delivery or where title was to pass. Accordingly, the cargo was at the risk of the purchaser during transportation and it could not recover for the shortage.

The express provision of the contract, quoted above, made it plain that payment of the purchase price, including freight, was not conditional on delivery of the material in Japan. Payment was to be cash against a certificate of weight, the Mate's receipt that he had received the weight on the ship, prepaid freight bills and invoices in duplicate. Thus payment was due on arrival of documents, the transmission of which most likely would be by faster means than the steel was being transported. The case, therefore, is distinguishable as concerns the liability for freight from the present case where freight was not to be paid until arrival of the cargo.

In *Pond Creek Mill & Elevator Co. v. Clark* (C.C.A. 7, 1921) 270 Fed. 482, a Chicago flour broker sued a milling company at Pond Creek, Oklahoma, for failure to make shipments under contract. The question was whether the

Illinois or Oklahoma statute of limitations applied. The contract was made in Oklahoma and if it also was to be performed there the Oklahoma statute barred the action. The court held that the contract was to be performed in Oklahoma, on the theory that delivery to pass title to the buyer would have taken place there upon delivery to the common carrier for shipment had the seller performed its contract. The court so held although the prices were specified to be net to the seller "in bulk basis Chicago". The court found the transaction analogous to that which takes place where a seller located in one place ships goods from there under a contract wherein the price is stated to be f.o.b. another place, which may or may not be the destination. Delivery to the buyer is complete when made to a common carrier at the place where the seller produces the goods or has them for sale. But from the agreed price there is to be deducted freight to the f.o.b. point (where the carrier collects freight from the buyer) regardless of the place to which the goods are actually shipped. Thus, if flour sold at a price f.o.b. Chicago were shipped from Pond Creek, Oklahoma, to Detroit, Michigan, there would be deducted from the stipulated purchase price an amount sufficient to pay freight from Pond Creek to Chicago and the purchaser would pay only for transportation beyond Chicago.

In the cited case liability for the purchase price undoubtedly would attach upon delivery to the carrier in Pond Creek, although the seller was to bear freight charges to Chicago. But this does not mean that had the contract provided that the price was to be paid upon or after arrival at Chicago that liability would have attached

before the flour reached there and would not have been dependent on its arrival there.

In *Meyer v. Sullivan* (1919) 40 Cal. App. 723, 181 P. 847 wheat was sold in 1914

“ . . . for shipment in September, doubtless early in September, from Seattle, in double bags, at one dollar, forty three & one-third cents (\$1.43 $\frac{1}{3}$) per 100 lbs. f.o.b. Kosmos steamer at Seattle, with the usual official certificate of the grain inspector to accompany the draft on us from the north.”

Due to war conditions the Kosmos Line cancelled its sailing schedule and the seller thereupon refused to fulfill its contract. The buyer was willing to accept delivery at the warehouse on the dock where Kosmos steamers customarily loaded or at any other warehouse in the Seattle harbor. In affirming judgment for the buyer for breach of contract, the court pointed out that the f.o.b. clauses were used in connection with a price; that in view of a well established custom in the trade the place of delivery contemplated was the dock where Kosmos steamers customarily loaded, not the deck of the vessel itself. The court further held, in line with the decision of the trial court, that if defendants were obligated to transfer the wheat from the dock to the deck of a Kosmos vessel the provision was for the benefit of the buyer who could and had waived it.

Had this action been one by the seller for the purchase price, it doubtless would have been held that the purchaser became liable for the price upon delivery of the grain at the dock, for the case was not one where payment of the purchase price was postponed beyond the time the grain was placed on the dock. The contract did not pro-

vide for payment of the purchase price on arrival of the steamer at destination.

In *Goodyear Tire & Rubber Co. v. Northern Assurance Co.* (C.C.A. 2, 1937) 92 F. 2d 70, the question was whether an insurance policy covered crude rubber destroyed by fire after being unloaded onto a dock at New York City, and this depended upon whether title to the rubber had passed from the seller to the buyer, who was the assured. The contract provided:

“Terms: Net cash 30 days from date of delivery at New York City.

“F.O.B.: Cars New York City.”

The insurance company unsuccessfully contended that the goods were at the risk of the seller until placed on cars in New York City. The court said that the f.o.b. provision placed under the heading “Terms” rather than “Place of Delivery” had relation to price and indicated that the cost of loading on cars was to be borne by the seller, “but the loading was not to affect the time when the purchase price was to be paid, namely, ‘30 days from date of delivery at New York City.’ ”

This decision would seem to support Appellee Guernsey-Westbrook Company in its construction of the phrase “OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER” rather than Appellant, for the clear implication of the decision is that delivery upon the dock at New York City was a condition precedent to liability for the purchase price.

In summary of the decisions upon which Appellant relies we would say that in none of them was the seller also the carrier. The cited cases are relevant to the

question as to when liability for the purchase price attaches as between buyer and seller. The present case concerns liability of the buyer to the seller-carrier for freight. The cited cases indicate that the fact that the purchase price is stated to be "delivered" at destination (e.g. "delivered Japan") or f.o.b. a named place beyond the point of shipment, does not necessarily mean that as between buyer and seller delivery occurs and liability attaches at that place. Title may pass and liability for the purchase price attach as of an earlier time, as upon delivery by the seller to a common carrier for shipment. From these *purchase price* cases Appellant argues that liability of Guernsey-Westbrook Company for *freight* attached before the lumber reached New York, by which Appellant must mean that it attached as soon as transportation commenced. Admittedly, liability of Guernsey-Westbrook Company for 98% of the purchase price less freight attached prior to the arrival of the steamer at destination. But the provision as to payment of freight was "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER".

In none of the cited cases, except *Goodyear Tire & Rubber Co. v. Northern Assurance Co.*, *supra*, which we regard as in our favor, was there a provision postponing the time of payment until arrival of the goods. For example, in *Boston Iron and Metal Co. v. Rosenthal*, *supra*, the provision was not that the price was to be paid on delivery in Japan, or on arrival of the goods in Japan. The price was payable cash against documents. The buyer is obligated to pay the price on tender of the documents without awaiting the arrival of the goods. (1 *Williston on Sales* (2d ed.) p. 606; *Fold on Sales*, p. 216; 32 *Yale Law Journal* 716.)

Furthermore, liability for the purchase price as between buyer and seller for goods which have passed out of physical control of the seller is a different matter from liability of the buyer to a carrier for freight on goods which the carrier has engaged to transport. The general rule is that "if, in a contract for purchase and sale of goods to be shipped to a given point, nothing is stated as to the place of delivery, the delivery to the buyer is complete when it is made to the common carrier at the place where the seller produces them or has them for sale." (*Boston Iron and Metal Co. v. Rosenthal*, 68 Cal. App. (2d) 564, 568, 156 P. 2d 963, 965; 1 *Williston on Sales* (2nd Ed.), Section 280h, p. 623; *Pond Creek Mill & Elevator Co. v. Clark*, 270 F. 482, 486.) But it is not the rule that liability for freight attaches in favor of the carrier when the carrier takes possession. On the contrary, the carrier must perform the service of transportation to earn its freight in the absence of a clear and unambiguous contract giving it the right to freight in the absence of performance of the service which is the consideration for the freight. For these reasons, the cases upon which Appellant relies do not support its position that freight became due although the lumber did not arrive at Brooklyn, New York. Rather, *Toyo Kisen Kaisha v. W. R. Grace & Co.*, *supra*, squarely supports the position of Appellee Guernsey-Westbrook Company. There, as in the present case, the action involved a carrier's right to freight under a contract provision by which freight was to be paid on arrival of the goods at destination.

II.

THE ABANDONMENT WAS NOT JUSTIFIED

Pope & Talbot, Inc. cannot succeed in either of these actions unless it was justified in abandoning the voyage on February 5, 1942. The conclusions of law in the Guernsey-Westbrook Company case include the following:

“There was no commercial frustration of the voyage of the steamship Absaroka from St. Helens, Oregon, to Brooklyn, New York, which justified the abandonment of the voyage at Los Angeles.” (Tr. of Rec., p. 54.)

There was a similar conclusion of law in the Blanchard Lumber Company case (Apostles on App., p. 38).

It is true that paragraph 7 of the bills of lading herein gives the carrier broad powers and wide discretion. That clause provides:

“... If because of conditions, actual or reported, at or near or between the port of loading and/or the port of discharge such as war, hostilities, ... blockade, ... or any regulations of any government ... or any condition whether of like nature to those named or otherwise and whether existing or anticipated, which may cause the Master to decide that it is unsafe or impracticable to proceed from or to any port ... or that the loading or discharging or carriage of the cargo is likely to be delayed ... then the vessel may, at its option ... store the goods ashore ... at the port or place where the vessel then is ... all at the risk and expense of the goods, their shipper, owner and consignee. Any such disposition of the goods shall constitute a final delivery thereof ... , but the Carrier shall retain a lien on the goods for all proper charges ...”

But such a clause is not to be construed to place a shipper at the mercy of a carrier acting in self-interest alone. Of course it is to the economic advantage of the carrier to be able to "earn" the freight without transporting the cargo to destination. But "such a clause must be given a reasonable interpretation, and the discretion conferred may not be exercised in an arbitrary or unreasonable manner, nor without substantial grounds, nor will good faith alone suffice." (*The Wildwood* (C.C.A. 9, 1943) 133 F. (2d) 765, 767.) It may well be that such a provision as clause 7 of the bills of lading will protect a carrier from liability for damages for what would otherwise be a breach of contract under circumstances which will not, however, give it a right to claim full freight under a "goods or vessel lost or not lost" clause for a voyage not completed.

A.

The Possibility of Requisition of the ABSAROKA by the Government Was Not a Ground of Abandonment

The District Court found:

"The defendant did not base its decision to abandon the voyage upon the possibility that the vessel would be requisitioned by the War Shipping Administration. The Absaroka was not suitable for a troopship and in the opinion of defendant was not vitally needed by the War Shipping Administration at the time when the voyage was abandoned. The defendant had not been advised that the Government required the Absaroka when it abandoned the voyage on February 5, 1942." (Finding X, Tr. of Rec., p. 53; Apostles on App., p. 38.)

Mr. Lunny, vice-president of Pope & Talbot, Inc., who made the decision to abandon, testified that he took such action because the company could not determine how long it would take to complete the repairs, that the date when the vessel would be ready was a matter of conjecture and could well be "a matter of months and months." (Tr. of Rec., p. 95, p. 102.) The witness did not give as additional reasons intensification of the submarine menace or the possibility of requisition, although he was examined as to those matters. As to the possibility of requisition, he testified:

"No one could say what the condition would be at the time she was repaired. She may well have continued on her voyage." (Tr. of Rec., p. 100.)

Here we have the admission of the witness who made the decision to abandon that it was not known at the time whether the government would requisition the vessel, that the ship was not of the type "vitally needed at that time" (Tr. of Rec., p. 104). In fact the government in effect requisitioned the vessel as of the time she should be repaired by a wire of April 14, 1942 from the War Shipping Administration (Tr. of Rec., p. 108), but the justification is to be determined as of the time of the abandonment rather than upon the basis of subsequent events. (*The Styria* (1902) 186 U.S. 1, 13, 22, 22 S. Ct. 731, 736, 739; *The Wildwood*, 133 F. (2d) 765, 767.) Furthermore, the abandonment of the voyage left the *Absaroka* free of commitments. It is possible the government might have postponed the effective date of its action to permit the ship, when repaired, to complete its pre-existing contracts.

B.

**Possible Increase of the Submarine Menace Was
Not a Ground of Abandonment**

The District Court found:

“The danger from submarine attacks to a vessel bound on an intercoastal voyage existed at the time that the steamship Absaroka sailed from St. Helens, Oregon, on this voyage. Defendant was aware of that danger at the time that the vessel sailed. Defendant did not know on February 5, 1942 what situation would exist with respect to danger from submarine attack at the time when the repairs to the vessel would be completed. Since defendant expected the voyage to be delayed for an indefinite period, it was highly speculative what, if any, menace would exist at the time the voyage could be resumed. Defendant based its decision to abandon the voyage primarily on delay.” (Finding IX, Tr. of Rec., p. 52; Ap. on App., p. 37.)

The danger from enemy submarine activity would have to be substantially greater than when the Absaroka sailed to justify abandonment on that ground, and the increase unforeseen (*The Wildwood* (C.C.A. 9, 1943) 133 F. 2d 765, 767, 768). The Absaroka was not loaded nor did she sail until after Pearl Harbor. She was loaded on or about December 13. She did not sail until December 18 (Tr. of Rec., p. 23-24; Apostles on App., p. 26-27).

It is a well known fact that before we entered the war, Germany had been carrying on a vigorous and disastrously effective submarine campaign in the Atlantic and the Caribbean. With our entry into the war, Germany's submarines, already cruising in the waters off our coasts, could

and did immediately extend their activities to include the ships of this country. That Germany would do this was, of course, to be anticipated and was, in fact, anticipated by Pope & Talbot, Inc. Mr. Lunny testified that his company took precautions to minimize the hazard by following directions of the War Shipping Administration and the Navy, such as painting the ship and the deckload (Tr. of Rec., p. 89). On the morning of Pearl Harbor, Mr. Lunny placed war risk insurance on all vessels of Appellant and all cargoes (Tr. of Rec., p. 107).

Mr. Lunny was well aware of the submarine menace when the Absaroka sailed. He testified that there was a submarine campaign in the Atlantic against the English and the French before we were in the war; that a great number of English and French ships were lost in the Atlantic before we entered the war; that he was watching the shipping during all this time, and although he was unable to testify to the number of British ships lost in 1941 before we were in the war, there were "a mass of figures" in the office of Pope & Talbot, Inc. (Tr. of Rec., p. 105-107). He also testified that the torpedo boat campaign was being waged against British and French shipping in the Caribbean before we were in the war (Tr. of Rec., p. 108).

The presence of Japanese submarines so close to our west coast so shortly after the attack on Pearl Harbor came as somewhat of a shock to many persons but, in view of the nature of the attack, indicating as it did cunningly calculated advance preparations, coastal submarine activity can scarcely be said to have been of such an unforeseeable nature as to warrant the abandonment of a voyage undertaken after the Pearl Harbor attack. Furthermore, having

embarked upon a voyage which would take the ship through Atlantic waters, which Appellant knew to be submarine infested, it is scarcely a ground for abandonment that, as it turned out, the same menace was lurking in Pacific waters.

It should also be said with reference to the claim of abandonment because of increased submarine activity, that any decision based on that factor, and Mr. Lunny did not testify that he based his decision thereon, should have been postponed until the repairs were completed. Cases where vessels have turned back while on the high seas because of apprehension of seizure or destruction through enemy action do not present a situation analogous to that involved in the present cases (*The Wildwood*, supra; *The Kronprinzessin Cecilie*, 244 U.S. 12, 61 L. Ed. 960. See notes 137 A.L.R. 1199, 1206, 1241, and 147 A.L.R. 1273, 1282). In *The Wildwood* and *The Kronprinzessin Cecilie*, and other cases which might be cited, present action was called for to meet an emergency which was reasonably conceived to be urgent. These ships were on the high seas. Here we have the *Absaroka*, an American vessel, undergoing repairs in an American port. In such a situation, the state of submarine activity on the possibility of requisition were matters to be considered when the vessel should be ready to sail upon completion of the repairs.

C.

Uncertainty as to When the Repairs Would be Completed Was Not a Ground of Abandonment

The trial court found:

“Defendant based its decision to abandon the voyage primarily on delay.” (Finding IX, Tr. of Rec., p. 52; Apostles on App., p. 37.)

The court further found:

“The abandonment of the voyage on February 5, 1942 was based primarily upon the ground that it could not be determined how long it would take to repair the steamship Absaroka, and that because the lumber was damaged by water and oil, and because the Coast Guard and the Navy would not allow it to remain piled high and defendant did not have labor enough to pile it properly, it would have deteriorated over a period of months due to ‘burning’ or dry rot and would have been likely to warp; that due to the fire hazard it was necessary to employ a watchman, which made the storage charges high.” (Finding XI, Tr. of Rec., p. 53; Apostles on App., p. 38.)

In the case of *Admiral Shipping Company, Limited v. Weidener Hopkins & Co.* (1916) 1 K.B. 429, 436, often cited in connection with the doctrine of commercial frustration, it was said:

“The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract, of such character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable *is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made.*” (P. 436. *Italics added.*)

Thus the delay must be inordinate or unreasonable to work a commercial frustration. It is our position that

the reasonableness of the delay in prospect must be determined with reference to the provisions of the contract. Time was not of the essence thereof. On the contrary, the bills of lading provided:

“Carrier is not and shall not be required to deliver said packages at the port of discharge or port of destination at any particular time, or to meet any particular market, or in time for any particular use.” (Paragraph 9.)

Here the seller-carrier's reservation of a right to make delayed delivery would seem to imply a correlative right in the purchaser to insist that such delivery be made or, at least, that it is not liable to pay freight, a recompense for delivery, under an earned freight clause where such delivery is not made. The fact that the purchasers wished delayed delivery, as evidenced by their protesting the abandonment, is an important factor. In making a decision to abandon, the interests of all concerned must be weighed. (*The Styria* (1902) 186 U.S. 1, 22 S. Ct. 731.)

Concerning this matter the trial court aptly said:

“Plaintiffs reasonably contend that the right to complete the voyage despite delay carried with it a correlative duty to carry out the contract despite delay, in the absence of extraordinary circumstances. Plaintiffs indicated by their objection to the abandonment a willingness to accept delayed shipments. There is no showing that the purposes of the contract would be frustrated by a indefinite delay. Also, Bethlehem Steel Company tendered defendant its offer for repairs on January 22, 1942, and the repair contract was negotiated. The repairs were actually completed on May 9, 1942. There are not sufficient facts to justify defendant's determination, of which notice

was given on February 5, or two weeks after the offer for repairs, that there would be such an inordinate delay in repairing the vessel as to justify an abandonment." (Tr. of Rec., p. 43.)

D.

The Condition of the Lumber Did Not Justify the Abandonment

Mr. Lunny testified that some of the lumber was oil stained, some of it damaged by salt water (Tr. of Rec., p. 97). He also testified that due to shortage of labor and Coast Guard restrictions limiting the height to which the lumber could be piled, it was so stacked that some of it was likely to "burn", that is, develop dry rot, and also to warp, and that the Coast Guard was desirous of getting the lumber off the dock because it was a fire hazard. (Tr. of Rec., p. 96, p. 99.) This is relied on by Pope & Talbot, Inc. as further supporting its decision not to hold the lumber shipment until the Absaroka should be repaired. However, the bills of lading in paragraph 3 provided, "Full freight and charges shall be payable, and so paid, on all damaged and unsound goods." The carrier would have had this right for freight on goods damaged by causes beyond its control, without express reservation *Jordan et al. v. Warren Insurance Co.*, Fed. Cas. 7,524; *Robinson on Admiralty*, p. 584, § 82). But the existence of this right would seem to dictate a correlative obligation on the carrier to deliver the damaged goods when the consignee is unwilling that the voyage should be abandoned or, at least, that the carrier if it does not deliver them, should not be entitled to "earned" freight to point of delivery.

It was not for Pope & Talbot, Inc. to make a unilateral

decision on the basis of the above factors. Concerning this matter the District Court in its opinion said:

“In *The Bohemia*, 38 F. 756, 758, an action involving damage to a cargo of potatoes during quarantine, the court said, ‘It is the general rule of the maritime law that in extraordinary circumstances, the master shall consult the shipper or consignee, where practicable, as respects his interests.’ *I think that since plaintiffs were willing to risk deterioration of the lumber, defendant may not rely on the possibility of such deterioration as a ground of abandonment.*” (Tr. of Rec., p. 44. Italics added.)

If the Coast Guard and the Navy deemed the lumber a fire hazard on the dock it could have given official notice to move it. As to the storage charges and expense of keeping a watchman, it would seem that under Paragraph 7 of the bills of lading such charges would be borne by the purchasers.

Appellant has cited a number of cases in which an abandonment was held to have been justified. None are analogous on their facts to the present cases.

In *Allanwilde Transport Corp. v. Vacuum Oil Co.* (1919) 248 U.S. 377, 63 L. Ed. 312, in *International Paper Co. v. The “Gracie D. Chambers”* (1919) 248 U.S. 387, 63 L. Ed. 318, and in *The Malcolm Baxter, Jr.* (1927) 277 U.S. 323, 72 L. Ed. 901, sailing vessels were prevented from leaving port by the government’s refusal of clearance to sailing vessels bound for the war zone. In *Standard Varnish Works v. The “Bris”* (1919) 248 U.S. 392, 63 L. Ed. 321, the vessel did not leave port because the government required a license to ship cargo to Gothenburg, Sweden and the license was refused.

In *Portland Flour Mills Company v. British & F. M. Insurance Company* (C.C.A. 9, 1904) 130 Fed. 860, the ship stranded and was abandoned as a total loss. In *Texas Co. v. Hogarth Shipping Corp.* (1921) 256 U.S. 619, 65 L. Ed. 1123, in *The Claveresk* (C.C.A. 2, 1920) 264 Fed. 276, and in *Bank Line, Ltd. v. Arthur Capel & Co.* (1919) A.C. 435, 14 Asp. M. C. 370, there was a requisition.

In *The Wildwood* (C.C.A. 9, 1943) 133 F. 2d 765, an American ship from a New Jersey port bound for Russia turned back on March 28, 1940 after reaching Honolulu and returned to Tacoma, Washington, upon news of British seizure of a Russian ship en route from San Francisco to Russia with similar cargo of copper bullion. The consensus of news reports at the time, which the carrier's officials in this country were following, was that the British blockade had been extended. In *The Kronprinzessin Cecilie* (1916) 244 U.S. 12, 61 L. Ed. 960, a German vessel bound from New York for Plymouth, England, and Cherbourg, France, turned back to New York in 1914 upon grave apprehension of war between England and Germany and fear of seizure.

In *The Styria* (1902) 186 U.S. 1, 22 S. Ct. 731, an Austrian steamship sailed from Trieste via Sicilian ports to New York carrying a quantity of sulphur. The master, on learning that war had broken out between Spain and the United States, unloaded the sulphur in Sicily because it was a contraband of war. In *M. A. Quina Export Co. v. Seebold* (C.C.A. 5, 1923) 287 Fed. 626, a charter was entered into after outbreak of war in 1914. It was held, however, that Germany's subsequent declaration of unrestricted submarine warfare was an extraordinary oc-

currence which justified the owner in refusing to perform the charter.

In *Admiral Shipping Company, Limited v. Weidener Hopkins & Co.* (1916), 1 K.B. 429, 13 Asp. M. C. 246, a vessel was loading at a Baltic port when war broke out in 1914. She was not allowed to leave the Baltic by Russian authorities.

In *Jackson v. Union Marine Insurance Co.*, 31 L. T. 789, 2 Asp. M. C. 435, a vessel under charter left Liverpool on January 2, 1872 for Newport. Here she was to load a cargo of rails for San Francisco. She ran aground January 3 and got off February 18. It was estimated that repairs could have been completed by July 1. The charterer threw up the charter and hired another ship. It was held that he was justified. But in this case the charter provided that the vessel was to sail "with all possible dispatch". It did not contain a provision such as that in the bills of lading herein providing for delayed delivery.

III.

THE EARNED FREIGHT CLAUSE WAS OPTIONAL

We have said above (page 3) that Appellees' contention that the earned freight clause is an optional one remains in these cases on appeal. For the reason that Appellant has mistakenly taken the position that Appellees' contention in this regard is not involved on this appeal, it has given no consideration to the question in its opening brief. In its brief in the trial court Appellant stressed the fact that earned freight clauses are in quite general use and cited a number of cases involving such clauses. That earned freight clauses are common

we agree. The court commented upon their frequent use in *Mitsubishi Shoji Kaisha v. Societe Purfina Maritime* (The Laurent Meeus) (C.C.A. 9, 1943) 133 F. 2d 552, 558. But we do not concede that the clause in the bill of lading used by Pope & Talbot, Inc. is a typical one. It provided:

“Full freight to destination on weight or measurement at Carrier’s option at declared rates (unless otherwise agreed) and all advance charges against the Goods are due and payable to the Carrier at its option upon receipt of the Goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost;” (Exhibit 1 to Pre-trial Stipulation in Case No. 11320 and Case No. 11321.)

In three of the six cases cited by Appellant in this connection in its brief in the trial court the earned freight clause related to prepaid or advance freight.

In *Int. Paper Co. v. The “Gracie D. Chambers”* (1919) 248 U.S. 387, 391, 63 L. Ed. 318, the clause read:

“Freight for said goods to be prepaid in full without discount retained and irrevocably ship and/or cargo lost or not lost.”

In *Standard Varnish Works v. The “Bris”* (1919) 248 U.S. 392, 397, 63 L. Ed. 321, the clause was as follows:

“Prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the vessel’s owners, vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere; . . .”.

In *Mitsubishi Shoji Kaisha v. Societe Purfina Maritime*, *supra*, the provision related to freight payable on telegraphic advice of signing bills of lading as follows:

“The freight to be paid in cash in New York less 1% discount on telegraphic advice of signing Bills of Lading and is to be considered earned and not returnable ship and/or cargo lost or not lost.” (133 F. 2d 552, 554.)

Examples of earned freight clauses not limited to prepaid or advance freight were considered in the following cases:

Transmarine Corp. v. R. W. Kinney Co. (1932)
123 Cal. App. 411, 413, 11 P. 2d 877, 878. The clause read:

“It is hereby expressly agreed that the freight (as stated herein) whether prepaid by the Shipper or to be collected at destination, becomes wholly due and belongs absolutely to the Carrier upon receipt of the goods into the custody of the Carrier or its agents, and if prepaid is not to be returnable, and if collect, is payable ship and/or cargo lost or not lost.”

Portland Flour Mills Company v. British & F. M. Insurance Company (C.C.A. 9, 1904) 130 Fed. 860, 863, involved a shipment of flour for Hongkong. The bill of lading provided:

“The several freight and primages to be considered as earned, steamer or goods lost or not lost at any stage of the entire transit.”

Pope & Talbot, Inc., upon the trial of these cases read into the record the earned freight clause in the form bill of lading used by the War Shipping Administration. The intent that the provision should apply to collect freight as well as prepaid or advance freight is clearly expressed as follows:

“Freight shall be payable on actual gross intake weight or measurement or, at carrier’s option, on actual gross discharge weight or measurement . . . Full freight hereunder to port of discharge named herein shall be considered completely earned on shipment whether the freight be intended to be prepaid or to be collect at destination; and the carrier shall be entitled to all freight and charges due him, whether actually paid or not, and to receive and retain them irrevocably under all circumstances whatsoever ship and/or cargo lost or not lost or the voyage broken up as abandoned.” (Tr. of Rec., p. 84.)

We quote the above provisions for the purpose of demonstrating that although earned freight clauses have wide currency there is a great variation in terms, and the interpretation of each such clause must depend on its own peculiar wording. That earned freight clauses as applied to collect freight are by no means so common as earned freight clauses relating to advance or prepaid freight, is indicated by the fact that Robinson in his text on Admiralty, published in 1939, states that frequently “the shipping papers provide that prepaid freight shall be at the risk of the voyage” (p. 591), without noting that

such clauses are sometimes also drawn to apply to collect freight. The treatment of the subject in *Poor on Charter Parties and Ocean Bills of Lading* (2d ed., 1930) page 71, is similar. (See also *De La Rama S.S. Co. v. Ellis* (C.C.A. 9, 1945) 149 F. 2d 61, where the form bill of lading of the Far Eastern Conference group of carriers is set forth. It relates to prepaid freight. See also *The Louise* (Md. 1945) 58 F. Supp. 445, 448.)

Pope & Talbot, Inc. also cite *Allanwilde Transport Corp. v. Vacuum Oil Co.* (1919) 248 U.S. 377, 382, 63 L. Ed. 312, which involved shipments by two different shippers on the same vessel. As to one of them there was a charter party providing as follows:

“ . . . freight to be prepaid net on signing bills of lading in United States gold or equivalent, free of discount, commission, or insurance. Freight earned, retained and irrevocable, vessel lost or not lost.”

The bill of lading for the shipment included the following:

“All conditions and exceptions of charter party are to be considered as embodied in this bill of lading.”

The bill of lading for the other shipment which was not under charter party provided:

“Full freight to destination, *whether intended to be prepaid or collect at destination*, and all advance charges . . . are due and payable to (the Allanwilde Transport Corporation) upon receipt of the goods by the latter; . . . and any payments made . . . in respect of the goods . . . shall be deemed fully earned and due and payable to the carrier at any stage before or after loading of the service hereunder without deduction (if unpaid), or refunded in whole or

in part (if paid), goods or vessel lost or not lost, or if the voyage be broken up; . . .” (Underlining added.)

Freight was in fact paid in advance on both shipments. The clause last quoted is more similar in some respects to that used in the form of Pope & Talbot, Inc. than are the provisions in the other cases cited, but observe that the phrase “whether intended to be prepaid or collect at destination” is not included in the form of Pope & Talbot, Inc. Nor does the provision open with an optional phrase such as that in the form of Pope & Talbot, Inc.

We do not go to the extent of contending in these cases that the clause in the form of Pope & Talbot, Inc. may apply only to prepaid or advance freight. Rather it is our position that the clause is an optional one, that it applies only where the carrier has exercised the option to declare the freight due and payable before the event relied on as terminating the voyage short of destination. In the case of Guernsey-Westbrook Lumber Company, Pope & Talbot, Inc. by the provision of its Acceptances had expressly precluded itself from exercising an option to demand the freight before arrival at destination. In the Blanchard Lumber Company case there was no such contract, but in fact Pope & Talbot, Inc. had shipped the lumber collect and had not before its decision to abandon the voyage in February, 1942, attempted to exercise an option to declare the freight due and payable (Tr. of Rec., p. 27; Apostles on App., p. 29). Both as to the Guernsey-Westbrook Company and the Blanchard Company, therefore, it is our position that in the circumstances shown the earned freight clause never became operative.

We need not reiterate the rules of interpretation which dictate that any uncertainty or ambiguity should be resolved against Pope & Talbot, Inc.

This construction does not overlook the fact that the clause provides not only that there shall be no refund of freight paid, but also for payment of unpaid freight without deduction. There is scope for application of this provision under the construction for which we contend. The carrier by a demand for payment may exercise an option to require payment of the freight before arrival at destination, where such an option does not contravene the agreement of the parties. But the demand may not have been met when vessel and cargo are lost, in which event freight is due under the clause notwithstanding non-delivery.

We have heretofore referred to the English rule under which the carrier was entitled to freight in the event the voyage was lost without his fault where the contract provided for prepaid freight without the necessity for a special earned freight clause.

In *Smith, Hill & Co. v. Pyman, Bell & Co.* (1891) 1 Q. B. 742, a charter party contained the clause, "One-third freight, if required, to be advanced, less 3 per cent for interest and insurance." The shipowner did not attempt to require payment of freight until after the cargo had been lost. Recovery was denied. The shipowner had an option to require payment of advance freight. The requiring of payment was said to be a condition precedent to the obligation to pay. An enforceable demand could not be made after the cargo was lost.

CONCLUSION

We maintain that Appellee Guernsey-Westbrook Company is not liable for freight for the reason that the contracts between it and Appellant Pope & Talbot, Inc. made the Guernsey-Westbrook Company's liability dependent on arrival of the lumber at destination. *Toyo Kisen Kaisha v. W. R. Grace & Co.* (C.C.A. 9, 1931) 53 F. (2d) 740, is direct authority for the contention of Appellee Guernsey-Westbrook Company that the provision in the Acceptances "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER" means that freight is not due unless the lumber is delivered at destination. In the event of a conflict between the Acceptance provision and the bill of lading the provision in the Acceptance controls.

Appellee Guernsey-Westbrook Company is not liable for freight for the additional reason that the earned freight clause is an optional one and applies only where the carrier has exercised an option to declare the freight due before the voyage is abandoned. Under the terms of Acceptances Pope & Talbot, Inc. was without right to exercise an option to declare freight due and payable from Guernsey-Westbrook Company before arrival at destination because the Acceptances provided "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER."

The argument that the earned freight clause is an optional one applies also in the case in which Blanchard Lumber Company is libelant. As to that company the lumber was in fact shipped collect, and Pope & Talbot, Inc. had not prior to its declaration of abandonment exercised an option to declare the freight immediately due and payable. In the circumstances the earned freight clause

never became operative as to it. Hence no freight is due from Blanchard Lumber Company.

In any event a carrier has no rights under an earned freight clause where it unjustifiably abandons the voyage. The trial court has sustained Appellees in their contention that the abandonment was not justified. The judgment in Case No. 11320 and the decree in Case No. 11321 should be affirmed.

Respectfully submitted,

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Nos. 11,320 and 11,321

United States
Circuit Court of Appeals
For the Ninth Circuit

POPE & TALBOT, INC., a corporation,
Appellant,
vs.

GUERNSEY-WESTBROOK COMPANY,
a corporation,
Appellee.

POPE & TALBOT, INC., a corporation,
Appellant,
vs.

BLANCHARD LUMBER COMPANY OF SEATTLE,
a corporation,
Appellee.

Appellant's Reply Brief

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United States
Circuit Court of Appeals
For the Ninth Circuit

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RESTATEMENT OF ISSUES

There are two separate cases, one in admiralty and one at law, consolidated in these appeals. Some of the issues are identical for each case, others are involved in only one case. For these reasons it is believed that it would be helpful to the court to re-state the issues and outline the result of the possible decisions on each issue.

The issues as presented by the briefs are:

1. Whether the language of the acceptance of the sales order precludes retention of the freight money by appellant under the earned freight clause of the bill of lading. This issue is present only in the Guernsey-Westbrook action at law.

2. Whether the earned freight clause is optional or self-executing, and if optional, whether the option was exercised. This issue concerns both the Blanchard case and the Guernsey-Westbrook Case.*

3. Whether there was commercial frustration entitling appellant to abandon the voyage. This issue is involved in both cases.

If issues 1 and 2 only are decided by this court in favor of appellant, appellant will be entitled to retain \$937.25 representing freight on Guernsey-Westbrook Company's lumber destroyed at the time of the torpedoing and the judgment in favor of Guernsey-Westbrook should be reduced by that amount regardless of the decision on issue 3.

If issues 2 and 3 only are decided by this court in favor of appellant, the entire decree in favor of Blanchard Lumber Company should be reversed, regardless of the decision on issue 1.

If, of course, issues 1, 2 and 3 are decided by this court in favor of appellant, the judgment in both the Guernsey-Westbrook case and the decree in the Blanchard Lumber

*As appears later in this brief, we contend that as this question was first raised on this appeal by appellees' answering brief, it is not at issue in the appeals. It is listed in this statement for purposes of clarity.

Company case should be reversed, and appellant would accordingly be entitled to retain all the freight in both cases.

ARGUMENT

I.

APPELLANT IS NOT PRECLUDED BY THE TERMS OF THE GUERNSEY-WESTBROOK SALES CONTRACT FROM RELYING ON THE EARNED FREIGHT CLAUSE.

A—The provisions of the acceptances did not make delivery a condition precedent to payment of freight.

We are in accord with appellees' statement that under a c.i.f. sale where the freight rather than being paid directly by the buyer to the seller is deducted from the purchase price and the goods are shipped on "collect freight" basis, the buyer's liability for the freight is to the carrier and depends on whether the carrier under the contract of affreightment is entitled to the freight. Nor do we disagree with the principle that the seller may not arrange transportation on terms which are in violation of the buyer's instructions. But we do emphatically disagree with appellees' argument that under the terms of the contract of sale between Pope and Talbot, Inc., Lumber Division, as seller, and Guernsey-Westbrook, as buyer, the seller was precluded from arranging transportation on behalf of the buyer under a bill of lading which contained an earned freight clause.

The language on which appellees place such reliance must be examined in its factual setting. The Guernsey-Westbrook Company sent an order to appellant's Lumber

Division's New York sales office for a designated quantity and type of lumber at a stated price, c.i.f. Green St., Brooklyn, N. Y. The price included freight at \$16.00 per 1,000 board feet (Exhibit 4 to Pre-Trial Stipulation in Case No. 11320). In making the order, Guernsey-Westbrook either could have determined to pay the full purchase price including freight on receipt of shipping documents, leaving to the seller the obligation to arrange for and to prepay the freight, or it could have requested an allowance of the freight charges from the seller's invoice price, in which event the seller would arrange for transportation for buyer's account on customary "collect freight" bills of lading. It chose the latter method, stating, "Terms: After deducting ocean freight, sight draft for 98% attached invoice * * * etc."

The sales contract was completed by the "acceptance of order" prepared by appellant's Lumber Division's New York Office. It too lists the quantity, type and size of the lumber, and designates a price c.i.f. Brooklyn which included the freight. In keeping with the buyer's choice of one of the two methods of payment of the price under a c.i.f. sale, the seller merely identified the method by which the total purchase price was to be paid by the language:

"Terms: ocean freight net cash on arrival of steamer; Balance 98% sight draft with documents attached, including negotiable bill of lading to order of Marine Midland Trust Co."

The seller in using the above language was not thinking about nor concerned with delivery or arrival of the goods or the details of carriage. It was thinking about how the total price was to be divided up and paid in accordance

with the order. In using the words "ocean freight net cash on arrival of steamer" it meant the ocean freight will be deducted from the invoice price and the goods will be shipped on a steamer under a usual bill of lading on collect freight terms for buyer's account. The seller was not making arrival of the steamer a condition to the buyer's paying the freight; it was only interested in designating *the type of sales transaction*. A buyer in reading the provision would so interpret it.

In our opening brief (pp. 12 to 18) we cited and discussed a number of cases which illustrate that in sales contracts where a place of delivery is mentioned in conjunction with terms of price, the reference is to the amount of or manner of paying the price and does not make delivery a condition to performance. Appellees' brief (pp. 24-33) rejects these authorities on the grounds that the facts are dissimilar to the case under discussion. While the cases cited are not factually on all fours with this case, they nevertheless serve to demonstrate what it is that parties to a sales contract, such as that under consideration, have in mind in referring to place of delivery in connection with price terms.

Appellees properly point out that the acceptance was prepared by the appellant. Is it reasonable to presume that a seller would voluntarily prepare an acceptance of an order in such a way as to compel himself to require a carrier to omit a standard clause of its bill of lading thus making it difficult for the seller to arrange transportation or, if he contemplates shipping by his own vessel, to require himself to omit a standard clause of his own bill of lading? The mere statement of the proposition demonstrates that the acceptance was the completion of

the sales contract and not part of a contract of affreightment, and the language used was sales contract language.

If the torpedoing had not occurred but for some reason the lumber had been transferred to railroad cars for the last part of the transportation and the steamer did not put in to Brooklyn, we seriously doubt if Guernsey-Westbrook Company would claim that it was not required to pay the freight, and yet under their literal interpretation of the provision, as there would be no "arrival of steamer at destination," the so-called condition for payment would not have been met. This example serves to illustrate that the language was not intended to make arrival of steamer a condition to payment of freight but merely to designate that the freight portion of the invoice price would be taken care of by a "freight collect" shipment.

B—The provisions of the Acceptance did not constitute a direction to eliminate the earned freight clause.

The seller, under a c.i.f. contract of sale in which the freight charges are allowed on the designated purchase price has the duty of arranging transportation for the account of the buyer under usual and customary terms. Since in such a sale the seller is relieved of any obligation to pay the freight charges, he normally arranges transportation as agent for the buyer under "collect freight" bills of lading. It is manifest that the seller is authorized to accept for the buyer the customary terms of the carrier's bill of lading.

There is nothing novel about the use of an earned freight clause by an ocean carrier. Nor is there any novelty about such a clause as applied to "collect freight" shipments. An earned freight clause was upheld by the

Ninth Circuit Court of Appeals in a collect freight shipment as far back as 1904. *Portland Flour Mills Company v. British & F. M. Insurance Company*, 130 Fed. 860. Nor has the use of earned freight clauses of all varieties and in all types of shipments diminished. The universal adoption of earned freight clauses was recognized by this Court in

Mitsubishi Shoji Kaisha v. Societe Purfino Maritime 133 F. (2d) 552,

in stating, p. 558:

“For over a quarter of a century the majority, if not all, of the larger Steamship Companies have had similar clauses in the hundreds of thousands of bills of lading issued for the ocean carriage of merchandise. They are accepted as normal incidents of sea borne commerce and are one of the factors in determining ocean freights.”

Appellees assert that the words “ocean freight net cash on arrival of steamer” in the seller’s acceptance to the buyer’s order constitute a direction precluding the use of an earned freight clause in transportation arranged by the seller for the buyer’s account. While we do not contend that the seller under such a c.i.f. sale would be permitted to obtain transportation on behalf of the buyer under a bill of lading which contained an earned freight clause if the buyer specifically instructed the seller to require the carrier to omit such a clause, we do maintain that in view of the widespread use of earned freight clauses the direction must be clear and explicit and leave no doubt that such is its purpose.

The provision relied on by Guernsey-Westbrook Company in the sales acceptance does not meet the require-

ments of a direction precluding an earned freight clause. First, as shown above, the provision is not intended to and does not constitute a direction as to terms of transportation but appears in a sales contract and refers to the manner in which the total purchase price, which included freight, was to be taken care of by the buyer.

Second, both the District Court and appellees maintain that the provision is ambiguous (appellees' brief p. 7). An ambiguous clause should not be held to be a direction to a seller to refrain from arranging transportation under standard accepted terms.

Third, at the most the provision "ocean freight net cash on arrival of steamer" is but a direction to arrange transportation on "collect freight" basis. There is nothing inconsistent about "collect freight" and an earned freight clause, as is shown by cases discussed by appellees which uphold such clauses in collect freight shipments. Under normal conditions of transportation freight is collected "on arrival of steamer at destination". The earned freight clause takes care of the abnormal situation when the voyage is frustrated. An instruction to ship "collect" is not an instruction prohibiting the use of an earned freight clause.

Fourth, the language which is said to constitute an instruction precluding the seller from shipping under a bill of lading containing an earned freight clause is the seller's own language. A seller will not give itself odious instructions. Common sense shows that a seller shipping on another's vessel, as could have been done under the sales contract in the instant case, would not voluntarily and unnecessarily take upon himself the task of requiring the carrier to alter its customary bill of lading. *A fortiori*

a seller who contemplates shipping by its own conveyance would not by its own voluntary act force itself to alter or eliminate favorable provisions of its own bill of lading.

C—No inference of intent to eliminate the earned freight clause can be drawn from Appellant's insurance program.

Guernsey-Westbrook contends (Appellees' Brief, p. 20) that in the absence of any explanation, the fact that Pope and Talbot, Inc. procured insurance to cover freight on the SS Absaroka raises an inference that it believed it would not be entitled to freight if the goods did not reach their destination. It should be remembered that the contracts and shipments involved in these appeals were made in the beginning of the war with Japan. On the morning of Pearl Harbor, Mr. Lunny, Vice President of Pope and Talbot, Inc., from his home arranged for complete war risk blanketing the entire operations of the company (T. 107). In addition, the company had an open policy of marine insurance covering its operations, including freight (T. 19). Appellees' shipments on the SS Absaroka were but a small portion of the whole shipload, the bulk of which was owned by appellant (T. 132). It is obvious that appellant, in arranging insurance on its operations as a whole and obtaining coverage accordingly, was not in those hectic days considering each minor transaction separately. It is not reasonable to presume that appellant considered for a moment appellees' strained construction of the language of the acceptance and thereby determined to obtain insurance coverage for the freight on the shipments. The inference which appellees seek to draw is unfounded.

D—The T. K. K. Case is not in point.

Counsel for Guernsey-Westbrook Company, as did the District Court, contend that the decision of the Ninth Circuit Court of Appeals in *Toyo Kisen Kaisha v. W. R. Grace & Co.* 53 F. (2d) 740, is controlling authority that the provision in the acceptances, "Terms: ocean freight net cash on arrival of steamer", required delivery at destination as an absolute condition to payment of freight and negatived the earned freight clause of the bill of lading. The T. K. K. case is distinguishable in two important respects.

The first distinction is that the contract which was held to eliminate the earned freight clause of the bill of lading in the T. K. K. case was a contract of affreightment between shipper and the carrier and involved neither as seller or buyer. Its sole purpose was to set out the terms of the affreightment, whereas in the case at bar the language of the acceptance which it is contended controls and eliminates the earned freight clause of the bill of lading is in a sales contract between seller and buyer. Its purpose is to set forth the terms of the sale and the purpose of the quoted language is to show how the freight charges, which were part of the purchase price, were to be handled. In answer to this distinction, appellees say the provision "restricts the terms on which the seller *as carrier* may charge freight." While we hesitate to further discuss a case which has been considered at length by both parties and is familiar to this court, we feel it may be helpful to point out in more detail the differences between the contract in the T. K. K. case and the acceptances on which appellees rely. Examination of

the confirming letter in the T. K. K. case from the shipper to the carrier proves conclusively that it is concerned solely with the problem of transportation. There is no mention of any sale or price.

The first paragraph makes reference to a prior telephone conversation. The second paragraph describes the total tons to be shipped, names the vessel to perform the carriage and the freight rate. The third paragraph consists solely of the provision, "Freight payable in San Francisco on receipt of weights in Honolulu." The fourth paragraph determines the manner of loading, the rate or speed of discharge and names the wharfs where cargo is to be discharged. The fifth paragraph refers to the cost of the weighing necessary to determine amount of freight charges. The sixth paragraph asks for confirmation. The letter details the terms of transportation only. Contrast this letter to the acceptance which, contrary to the implication of appellees' brief (pp. 6, 16), does not even name the vessel or the carrier and gives no details of transportation other than as directly related to the sales price. Not only is the acceptance completely lacking in any details of the transportation but, opposite to the contract in the T. K. K. case, contains every detail regarding the sale and the quantity, type, price and terms of sale. It is submitted that a comparison of the documents adequately proves the distinction.

The second major distinction between the cases is that the bill of lading in the T. K. K. case specifically referred to the prior agreement by marginal notation stating "Freight as agreed" and "Freight as per agreement," thus disclosing a clear intent to abide by the terms of

the prior contract of affreightment. No reference to the acceptance on which appellees rely appear in the margin or any place in the bill of lading covering appellees' shipments, for the obvious reason that the sales contract was no part of the affreightment contract. Appellees' answer to this distinction is that the bills of lading in the T. K. K. case "contemplated marginal notations." We fail to see the significance of such fact, if it is a fact.

II.

THE EARNED FREIGHT CLAUSE WAS NOT OPTIONAL BUT SELF-EXECUTING.

A—Appellees may not now raise the issue.

In our opening brief we did not discuss the contention raised in the trial court by the appellees that for appellant to take advantage of the earned freight clause it was required to exercise an option which it failed to do, for the reason that the District Court correctly decided the issue in favor of appellant. The issue was not presented by the Assignment of Errors in the admiralty case nor by the Statement of Points upon which appellant intends to rely on appeal in the law case. Appellees did not file cross-appeals or counter designation of points in either case. It is our contention that appellee has waived any right to raise the issue.

Appellees cite (their brief, p. 4) *The John Twohy*, 255 U.S. 77, to the effect that upon an appeal by a party to an admiralty suit the non-appealing party may challenge the judgment in so far as it is adverse to him. The decision is limited to an admiralty appeal. Its basis is that in admiralty an appeal is a trial *de novo*.

Under the authority of this decision it is probable that Appellee Blanchard Lumber Company would not be required to file a cross-appeal to raise the option question in the admiralty action. However, under Rule 19, Subdivision 6 of the rules of this Honorable Court, Appellee Blanchard Lumber Company, on being served with appellant's Assignment of Errors and Statement of Points which adopted the Assignment of Errors, and noting that such Assignment of Errors referred only to the question of abandonment, was required to file within ten days a counter-designation of additional points or parts of the record and failure to do so constituted a consent to a hearing only on the single issue raised by appellant, namely, frustration.

In the Guernsey-Westbrook action at law, in addition to requiring a counter-Designation of Points under Rule 19, Subdivision 6, referred to above, the authorities definitely require that appellee file a cross-appeal "either to enlarge his rights under the judgment appealed from or to lessen the rights of his adversary."

Arkansas Fuel Oil Company v. Leist, 133 F. (2d) 79 (CCA 5);

Morley Construction Co. v. Maryland, 300 U.S. 185, 81 L. Ed. 593;

U. S. v. Johnson, 98 F. (2d) 462 (CCA 8);

Ency. of Federal Procedure, Vol. X, Sec. 5172;

O'Brien's Manual of Federal Appellate Procedure, 3rd Ed., p. 53;

Moore's Federal Practice, Volume III, p. 3576.

Having failed to file a cross-appeal on the part of the judgment decided adversely to appellees, they may not

by reply brief in Pope and Talbot's appeal, raise the question.

B—The decision of the District Court rejecting appellees' contention that the earned freight clause was optional is correct.

While under the above authorities appellees may not now raise the question as to whether the earned freight clause is optional and whether, if so, the option had been properly exercised, as appellees' brief discussed the question at length we desire to answer the argument and to point out that the District Court's decision in this respect was proper. The paragraph containing the earned freight provision is as follows:

3. "*Full freight to destination on weight or measurement at Carrier's option at declared rates (unless otherwise agreed) and all advance charges against the goods are due and payable to the Carrier at its option upon receipt of the goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost, * * *.*" (Emphasis supplied).

It is manifest that the first option in the paragraph refers to the carrier's right to determine freight on the basis of either weight or measurement. It has no relation to the subsequent earned freight provision. The second

option gives the carrier the privilege of determining whether the freight shall be collected by it "upon receipt of the goods". This option in effect gives the carrier the right to designate in the space appearing therefor on the face of the bill of lading the words "prepaid". The shipments in question were on the collect basis and the framed space on the face of the bill of lading so designated. This option does not extend to or refer to the earned freight clause which begins at the semicolon. The earned freight clause is the agreement that the freight "shall be deemed fully earned and due and payable to the carrier at any stage, etc." The words "and the same" preceding the foregoing quotation refer to "Full freight to destination." The carrier to thus take advantage of the earned freight clause was not required to exercise any option. The District Court ably discussed the point and decided that the earned freight clause is self-executing, in the following language (T. 40-41):

"The first option obviously refers to 'weight or measurement'; the second refers to the right of the carrier to declare freight due and payable upon receipt of the goods. The latter option, as defendant states, was not exercised. The remainder of the clause, appearing after the semi-colon, necessarily relates to the carrier's right to freight 'goods or vessel lost or not lost'. The words 'and the same' at the beginning of the second portion of the clause, can logically only relate to 'full freight to destination' and not, as contended by plaintiffs, to 'the freight which has become due and payable through the exercise of defendant's option.' The latter portion of the clause can only be intended to provide for the contingency of defendant's inability to deliver the goods, whether advance freight and charges have or have not been

paid. Otherwise the words 'without deduction (if unpaid) or refund in whole or in part if paid' would be meaningless. It will also be noted that while the first section of the clause relates to freight and advance charges payable upon receipt of the goods by the carrier, at its option, the second portion relates to freight and to 'further sums' which in their nature would become due after receipt of the goods, whether or not the option had been exercised, indicating that the exercise or non-exercise of the option would have no bearing on the effectiveness of the latter portion of the clause. In the lower righthand corner on the face of the bill of lading is a 'framed' space where freight may be designated either as 'total collect' or 'total prepaid'. It would be unreasonable and forced construction of the clause to find that defendant intended to secure its freight charges, in case of its inability to deliver the cargo, only if the same had been prepaid. *I conclude that the earned freight clause is self-executing and that no option was required to be exercised to make it effective.*" (Emphasis supplied.)

Appellees not only contend that the earned freight clause is dependent on an option which, as pointed out does not in fact exist, but further contend that the supposed option has a time limit; that it must have been exercised, if the carrier was to have taken advantage of the earned freight clause, "before the vessel was torpedoed" (Their Brief, p. 5).

We are unable to discern from what language or what provision this time element is derived nor do appellees furnish any help in indicating its source. If paragraph 3 of the bill of lading were to be construed as requiring the carrier to exercise an option to make the earned freight

clause effective, it is submitted that such an option could be exercised at any time and in any manner. A declaration of intent to retain the freight money from the sale of the proceeds would suffice.

Not only does the language of paragraph 3 demonstrate that the earned freight clause of paragraph 3 is self executing but a consideration of the practical aspects of the clause compels the same conclusion. We can conceive of no reason why a carrier, in preparing a bill of lading, would require itself to exercise an option to make effective a clause which is written entirely for its benefit. Under what circumstances would the carrier not desire to have the earned freight clause effective?

Appellees endeavor to make some point of the assertion that the earned freight clause in Pope and Talbot, Inc.'s bill of lading is not "typical" as judged by clauses appearing in the decided cases (brief p. 45). But the point, if it is a point, is answered in their brief where they state (p. 47) "—although earned freight clauses have wide currency there is a great variation in terms, and the interpretation of each such clause must depend on its own peculiar wording." Appellees further assert that earned freight clauses applied to collect freight are not so common as those applied to prepaid freight and conclude that there must be a clear showing that they are to be applied to collect freight before such application will be upheld. The basis of the assertion that such clauses "are by no means so common" as applied to collect freight is the comparison of the number of cases decided and discussed by the authorities dealing with both types of affreightment. We submit that the amount of litigation in which earned freight clauses as applied to collect freight are

considered has no bearing on the number of steamship companies adopting earned freight clauses applicable to collect freight or the frequency of their use. Furthermore, appellees' conclusion that the earned freight clause to apply to collect freight must specify "this clause is applicable to collect and prepaid shipments" or equivalent language is unfounded as demonstrated by the decision of this Court in *Portland Flour Mills Co. v. British & F. M. Ins. Co.* (CCA 9) 130 Fed. 860. The earned freight clause read:

"The several freight and primages to be considered as earned, steamer or goods lost or not lost, at any stage of the entire transit."

The clause makes no reference to either "earned" or "collect" freight, although in fact the freight under the bill of lading in that case was "collect". The court said, "In the present case the intention of the parties was clearly expressed in the bill of lading. There was nothing of an equivocal or ambiguous character contained therein and there were no words used which required any oral testimony as to their true meaning."

We submit that the earned freight clause in paragraph 3 of the bill of lading issued for appellees' lumber is not ambiguous, and is self-executing and the District Court correctly decided the issue.

III.

THE ABANDONMENT WAS JUSTIFIED

Due to the complexity of the first issue discussed in this brief, we have devoted considerably more space to it than to the issue of abandonment. However, we consider the question of abandonment the primary issue and accordingly desire to emphasize that the brevity of our discussion relative thereto is not commensurate with the magnitude of its importance.

There is no disagreement between the parties to this appeal with respect to the legal principles under which a carrier is entitled to declare that a voyage has been commercially frustrated and thereby collect or retain freight under an earned freight clause. The principal difference of opinion is with respect to the facts confronting appellant in abandoning the voyage and in the interpretation of the testimony relative to such facts.

The point which appellees most stress and which was relied upon by the District Court is that Mr. Lunny, Vice President of Pope & Talbot, Inc., who made the decision to abandon, in his testimony emphasized delay in making repairs as a reason for abandonment. Appellees derive therefrom the conclusion that other factors which Mr. Lunny testified existed at the time of the decision to abandon can not be considered as grounds for abandonment. The decision which this court must make as to whether the abandonment was justified is not limited to what was most emphasized in the testimony but must be determined on the basis of all the factors existing and considered by appellant regardless of the comparative weight subsequently attributed by appellant to particular factors.

It is not our purpose again to repeat and discuss at length all of the factors justifying the abandonment, but merely to comment briefly on some of the points raised by the appellees. Appellees point out that, at the time of the decision to abandon, the vessel was not in fact requisitioned and that appellant did not know for certain that it would be requisitioned or otherwise required by the government. Actual governmental interference is not required; anticipated governmental interference is equally a ground for abandonment. The government did not customarily forewarn ship operators that their ships were to be requisitioned. Appellant testified that it "felt reasonably certain" the vessel would be required by the government. (T. 100) Its expectations were justified by the fact that the vessel was actually requisitioned by wire of April 14, 1942 from the War Shipping Administration.

Appellees hazard the conjecture that if the Absaroka had not been free of commitments the government "might have postponed the effective date of its action to permit the ship when repaired to complete its pre-existing contracts." There is nothing to indicate that the government, in sending the wire, was aware of the abandonment of the voyage. Our conjecture is that the government neither knew nor cared whether the vessel was free of commitments. The Absaroka was especially adapted to the carrying of long pile, which was "just what Pearl Harbor needed." (T. 104) Such needs were more important than the completion of private commercial ventures.

We agree that to constitute a ground for abandonment, the danger from submarine activities would have to be substantially greater when the decision to abandon was

made than when the vessel sailed. But that condition was fully met. The essential consideration is not the mere possibility of submarine activities but their actual extent. Appellees point out that Pope & Talbot, Inc. was aware that there was a submarine campaign in the Atlantic against the English and the French before we entered the war, and that while the "presence of Japanese submarines so close to our West Coast so shortly after the attack on Pearl Harbor came as somewhat of a shock," nevertheless coastal submarine activity was not unforeseeable. Appellees further assert Mr. Lunny testified that there was a torpedo boat campaign in the Caribbean against the English and the French before we were in the war. His testimony, when queried directly on this question, was, "I don't know about the Caribbean before the war." (T. 106) The testimony with respect to the submarine campaign in the Atlantic before our entry into the war was with respect to English and French ships not in the waters along the Atlantic *coast* of the United States but in the *Atlantic*; obviously of primary concern to a trans-Atlantic voyage and comparatively remote to an American ship operator contemplating an intercoastal voyage which would extend only in part along our Atlantic seaboard.

While it was admittedly not beyond the realm of possibility when these bills of lading were issued that German submarines would move against American shipping on the Atlantic seaboard and in the Caribbean, and even that Japanese submarines would bridge over 7,000 miles of ocean to our Pacific coast, *the point is none of these events had taken place*. Prior to December 20, which is

two days after the Absaroka sailed, there was no evidence of Japanese submarines on the Pacific coast. (T. 26, 100) The first American vessel sunk in the Caribbean was appellant's West Ivis which sinking occurred after the Absaroka's torpedoing and before the decision to abandon. (T. 106) It is common knowledge that the intensive German submarine campaign off the Florida coast and along our Atlantic seaboard was subsequent to 1941. By contrast to the conditions thus existing at time of sailing, the testimony shows that *at the time of the decision to abandon* there was a real existing submarine menace "on the whole Pacific Coast, and on the whole Atlantic Coast," as evidenced by actual sinkings, "but the Caribbean was the worst * * * there were too many sinkings especially in that territory between the Panama Canal and the North Atlantic." (T. 101) Nor could anyone, with the possible exception of top Navy officers concerned, predict any improvement in the situation. Furthermore, it must be remembered that when the decision to abandon was made the Absaroka was undergoing repairs from an actual enemy submarine attack from which she was miraculously saved, and appellant had just lost another of its vessels by torpedoing. Considering these facts, it would be entirely unrealistic to say that this was not a hazard substantially greater than that resulting from the mere possibility of submarine attack, as the situation reasonably appeared at the time of sailing.

Again unrealistically, appellees have attempted to distinguish the cases which we cited in our opening brief by saying that these involved vessels which "turned back while on the high seas because of the apprehension of

seizure or destruction." Appellees emphasize the point by repeating "These vessels were on the high seas" and by contrast, stating "Here we have the Absaroka, an American vessel, undergoing repairs in an American port." The argument loses sight of the reason for the repairs. A vessel which has been torpedoed and almost sunk would appear as justified in not venturing forth into waters known to be infested by submarines as vessels which have not been attacked but which turned back because of the apprehension of such an attack.

We have not found a decision nor have appellees cited any cases which contain in one set of facts a combination of circumstances justifying the abandonment of a voyage approximating those which confronted appellant, although the reports are replete with cases in which the court considered the abandonment justified under less compelling circumstances. We submit that the abandonment of the voyage was entirely justified.

CONCLUSION

The decision of the District Court that the language of the acceptance in the Guernsey-Westbrook sales agreement precludes appellant from relying on its earned freight clause and that the abandonment of the voyage is not justified is in error. Its decision that the earned freight clause is self-executing can not be questioned by appellees in these appeals but in any event it is proper. It is accordingly respectfully requested that the decree in Case

No. 11321 and the judgment in Case No. 11320 be reversed to permit appellant to retain the freight to which it is entitled.

Respectfully submitted,

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